

No. **87-87**

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM 1986

VANCE E. WILLIAMS,

PETITIONER

versus

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

FIRST QUESTION

Whether this Petitioner has been denied his **Sixth Amendment** right to appeal pursuant to **F.R.A.P. Rules 28(i)** and **2** where:

- 1) The record from the district court clearly reflects that motions or objections made by one defendant were recognized by the court to be the identical motions or objections of all defendants and where co-defendant Oscar D. Silva objected during trial to midtrial publicity as being prejudicial in nature, such objection was also urged on behalf of Petitioner;
- 2) Petitioner specifically and timely adopted Issue Number Five concerning prejudicial publicity argued by co-defendant Oscar D. Silva in his brief, pursuant to **F.R.A.P. Rule 28(i)**, such issue being held by the Fifth Circuit to be reversible error in the reversal for further proceedings of Silva's conviction, demonstrating a conflict between the Circuits as to the application of the Rule;
- 3) The Fifth Circuit Court of Appeals refused to consider Petitioner's Motion to Adopt even though the court previously had granted same and notwithstanding the fact that in the court's opinion of January 29, 1987, the court held that Petitioner was entitled to a reversal based on the same grounds as co-defendant Oscar D. Silva had he adopted Silva's prejudicial publicity issue.

SECOND QUESTION

Whether the Petitioner herein was exposed to conviction for behavior Congress did not intend to reach under 18 U.S.C. sect. 1962(d) as a result of the Fifth Circuit's erroneous interpretation of the RICO conspiracy statute reflecting serious conflict between the Circuits, and where the jury instructions were erroneous as a matter of law and insufficient to inform the jury of the law of a conspiracy and a substantive violation of the **Racketeer Influenced and Corrupt Organizations Act (RICO)** which precluded the jury from applying the facts to the law of the case and from rendering a true verdict as to Petitioner.

THIRD QUESTION

Whether this Petitioner was denied his **Fifth Amendment** rights to due process and his **Sixth Amendment** rights to effective assistance of counsel and right to appeal as guaranteed by the Constitution of the United States, when Petitioner's Federal District Court conviction was affirmed on appeal where:

- 1) An actual conflict of interest arose during the trial due to the joint representation of Petitioner and his identical twin brother, Drake Williams, resulting in denial to Petitioner of his rights to counsel, effective assistance of counsel, due process of law, confrontation and cross-examination of witnesses and a fair trial;
- 2) The district court committed reversible error in failing to sever the trial of Petitioner from the trial of co-defendant Drake Williams resulting in extreme prejudice to Petitioner and denying him a fair trial.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Petitioner VANCE E. WILLIAMS certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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No. _____

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VANCE E. WILLIAMS,

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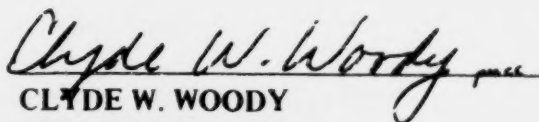
VERSUS

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

The Clerk will enter my appearance as Counsel for the
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IN THE SUPREME COURT OF THE UNITED STATES

VANCE E. WILLIAMS,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioner, **VANCE E. WILLIAMS**, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in the above styled cause (**App. A, infra, 1a**) is as yet unreported. A timely petition for rehearing was filed by Petitioner and denied by the Circuit Court (**App. B, infra, 1b**).

JURISDICTION

Judgment was entered by the United States Court of Appeals for the Fifth Circuit in Cause No. 85-2588, styled

United States of America v. Drake Williams, et al on January 29, 1987 and a motion for rehearing was denied on May 13, 1987. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. sect. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved herein are the **Fifth and Sixth Amendments to the Constitution of the United States**. The statutory provisions involved herein are **Rules 2 and 28(i) of the Federal Rules of Appellate Procedure, Rules 11 and 14 of the Federal Rules of Criminal Procedure and 18 U.S.C. sects 1952, 1961, 1962 and 21 U.S.C. 841(a)(1)**. The constitutional and statutory provisions are set forth in full in the appendix to Petitioner's Writ of Certiorari (App. C, *infra*, 1c).

STATEMENT OF THE NATURE OF THE CASE

1. PROCEDURAL HISTORY OF THE CASE:

The Petitioner, Vance E. Williams, was charged in a multi-count indictment returned on October 26, 1984, in the United States District Court for the Southern District of Texas for violations of the provisions of **18 U.S.C. sect. 1962**.

The issues raised by this proceeding concern only Count One of the indictment, which is a RICO conspiracy charge under **18 U.S.C. sect. 1962(d)**. The Petitioner was originally charged and convicted in Counts One and Three of the indictment, however, his conviction as to Count Three, which was a substantive RICO charge that alleged a violation of **18 U.S.C. sect. 1962(a)**, was subsequently reversed.

Petitioner was tried by a jury and was found guilty after an eight-week trial. His sentence was fixed at two 20 year terms of imprisonment to be served concurrently and a fine of Fifty Thousand Dollars (\$50,000.00) (**App. D, infra 1d**). The Petitioner appealed his conviction to the Fifth Circuit Court of Appeals. On January 29, 1987, the Fifth Circuit rendered its opinion reversing Petitioner's conviction as to Count Three and affirming as to Count One (**App. A, infra, 1a**).

Petitioner appealed and timely filed his brief with the Circuit Court. Due to the voluminous record, complex multiple issues and strict page limitations, Petitioner herein adopted by motion specific issues as raised by co-defendants in their briefs, as per the suggestion made by the Circuit Court and pursuant to F.R.A.P. 28(i). (**App. F, infra 1f**). Specifically, Petitioner adopted the issue of prejudicial midtrial publicity as raised by co-defendant Oscar D. Silva. Thereafter, Silva's conviction was reversed on all six counts based upon the prejudicial publicity issue. However, the conviction of Petitioner, who stood in the identical position as co-defendant Silva and who had complied with the rules in every respect, was upheld by the Circuit Court. After receiving the court's opinion delivered January 29, 1987, Petitioner filed a motion for rehearing (**App. G, infra 1g**) requesting the court to correct the mistake or oversight which was patently obvious on the face of the record. Rehearing was denied without the Court addressing Petitioner's contention. (**App. B, infra 1b**).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

Petitioner Was Denied His Sixth Amendment Right To Appeal Where His Objection To Prejudicial Midtrial Publicity Was

Urged During Trial And Thereafter On Appeal He Adopted The Argument Raised By A Co-Defendant Pursuant To F.R.A.P. Rules 28(i) and 2 Regarding Prejudicial Midtrial Publicity, But Was Denied The Relief Which Was Granted To His Co-Defendant Based On Those Grounds, Where Petitioner And His Co-Defendant Were In Identical Positions Relative To Such Publicity, Demonstrating A Conflict Between The Circuits As To The Application Of Rule 28(i).

This Honorable Court Should grant Petitioner's Writ of Certiorari herein due to the fact that Petitioner was deprived of his **Sixth Amendment** right to appeal when the Fifth Circuit refused to reverse his conviction despite Petitioner's compliance with all prerequisites to warrant a reversal of his conviction. Petitioner was one of 10 defendants tried on a 19 count indictment, in a trial which spanned eight-weeks. The trial transcript clearly demonstrates the agreement between Judge DeAnda and all defense counsel as to the manner of motions and objections made during the trial and their preservation by each defendant. (App. E, *infra*. 4e, 6e, 7e-8e, 9e, 10e).

In the Circuit Court's opinion issued January 29, 1987, the court acknowledged that co-defendant Silva had immediately requested the district judge to individually voir dire the jurors to see if the adverse midtrial publicity which had occurred had affected any of them (App. A, *infra*, 37a). After conviction, Oscar D. Silva appealed and in Issue Number Five of his brief argued that it had been error for the district court not to have asked the jury about the prejudicial publicity during the trial. The Fifth Circuit held that Silva's situation closely paralleled *United States v. Herring*, 568 F.2d 1099 (5th Cir. 1978), in which the Fifth Circuit had held it to be reversible error for the trial judge not to inquire of possible jury contamination (App. A, *infra*, 40-41a). Relying on its earlier decision in *Herring*, the Fifth Circuit held that the conviction of co-defendant Oscar D. Silva must be reversed and remanded based on these grounds (App. A, *infra*, 41a).

All defendants who had been convicted in the district court faced the same time deadline for filing briefs on appeal and due to the length of the record and multiplicity of issues involved and due to the strict page limitations in connection with their briefs, the Fifth Circuit suggested that pursuant to **F.R.A.P. Rule 28(i)** appellants should adopt by reference any parts of the briefs of other appellants appropriate to themselves. Due to the fact that Petitioner's motion to extend the page limit had been denied by the Circuit Court and due to the impossibility of adequately briefing all of the relevant issues within the page limitations, Petitioner on May 27, 1986, filed his Motion to Adopt pursuant to **F.R.A.P. Rule 28(i)** and therein specifically adopted the issue of midtrial publicity of co-defendant Oscar D. Silva, made the basis of the Fifth Circuit's reversal of Silva's conviction. (**App. F. infra, 1f**).

Petitioner contends that the issue raised by Oscar D. Silva, that resulted in a reversal of his conviction, was procedurally and properly preserved and adopted by the Petitioner herein and that same is clearly reflected in the records of this cause. At trial Silva's motion to voir dire the jurors regarding the affects of the midtrial publicity was also made on behalf of the Petitioner herein, as was made unequivocally clear by the numerous comments of Judge DeAnda during the trial. Thereafter, Petitioner timely filed his Motion to Adopt in which he specifically adopted the issue in question as argued by Silva in his brief. Petitioner's Motion to Adopt was granted by the Fifth Circuit Court of Appeals on May 29, 1986 and became a part of the record herein. However, the Fifth Circuit erroneously stated in its opinion of January 29, 1987, that Petitioner Vance E. Williams had not contended on appeal for reversal due to the prejudicial publicity nor had he adopted the argument of his co-defendant Oscar D. Silva pursuant to **F.R.A.P. Rule 28(i)** and that if he had made such an argument his conviction, as Silva's, would have been

reversed. (**App. A, infra, 41a**). Thereafter, Petitioner filed his petition for panel rehearing (*en banc*) (**App. G, infra, 1g**) and requested the Circuit Court to correct this error, which was clear on the face of the record. The Fifth Circuit, however, in denying such rehearing in its decision of May 13, 1987 (**App. B, infra, 1b**) refused to even address the issue, leaving the Petitioner with no other avenue of appeal but to the Supreme Court of the United States.

Rule 28(i), Federal Rules of Appellate Procedure, provides for the adoption by reference of any part of the brief of another in cases involving multiple appellants. This rule is one of convenience and intended to eliminate needless repetition, not to abridge the substantive right of an appellant in any manner. To extend to an appellant the opportunity of adopting parts of a co-appellant's brief implies an opportunity first to review co-appellant's brief and then select those portions the appellant desires to adopt. Petitioner Vance E. Williams did specifically adopt that part of co-defendant Oscar D. Silva's brief that entitled him to a reversal of his conviction pursuant to **F.R.A.P. Rule 28(i)** (**App. F, infra, 4f**).

The Fifth Circuit's decision in the instant case is in conflict with its prior holdings and in conflict with the decisions from other circuits due to its refusal to apply **F.R.A.P. Rule 28(i)** with respect to this Petitioner.

Even when the parties do not join in a single brief, as provided for by **F.R.A.P. Rule 28(i)**, it has been held that the failure of one appellant to file his own brief is not fatal when the issues raised on appeal are identical as to both appellants. *Marcaida v. Rascoe*, 569 F.2d 828 (5th Cir. 1978).

In *Childs v. Kaplan*, 467 F.2d 628 (8th Cir. 1972), the Eighth Circuit similarly held that an appellant who failed

to file a brief would not be dismissed for want of prosecution when one of the other appellants had timely filed a brief and the issues raised on appeal were identical to both appellants.

Petitioner Vance E. Williams and co-defendant Oscar D. Silva were identically situated regarding the adverse and prejudicial effects of the midtrial publicity. The Fifth Circuit acknowledged this identity of issues both in its opinion of January 29, 1987, (**App. A, infra. 41a**), and its denial of rehearing (**App. B, infra. 4b**), but persisted in its denial of relief to which this Petitioner was and is entitled.

In *United States v. Anderson*, 584 F.2d 849 (6th Cir. 1978), the Sixth Circuit in reversing an appellant's conviction based on his co-defendant's argument, held that even though the appellant had not adopted his co-defendant's argument either in his brief or prior to oral argument, that, appellant's conviction would also be reversed to avoid manifest injustice. The Sixth Circuit in reversing appellant's conviction therein relied on **F.R.A.P. Rule 2** as support for such reversal by stating that although it was rare that the court would consider issues not properly raised and argued before it, that in certain circumstances where a manifest injustice would result from allowing appellant's conviction to stand while ordering a new trial for his co-defendant, that both convictions should be reversed. **Id. at 853.**

The instant case did not pose such a problem for the Fifth Circuit however since Petitioner had properly preserved his objections at trial and specifically adopted the issue in question, which resulted in the reversal of Silva's conviction.

In reversing the conviction of an appellant who had not specifically adopted his co-defendant's argument by reference in his brief, the Fifth Circuit has heretofore relied upon **F.R.A.P. Rule 2**, in *United States v. Gray*, 626 F.2d 494

(5th Cir. 1980). In *Gray*, the Fifth Circuit explicitly stated that when all defendants suffer from the same error, but only one adopts the argument of a co-defendant in his brief, while all others waited until oral argument to adopt their co-defendant's contentions, that the court would ordinarily limit each defendant's appeal to the issues raised in their briefs. However, the court stated that under certain circumstances it was within the discretion of the court to suspend the Federal Rules of Appellate Procedure "for good cause shown." *Id.* at 497. The court further stated that it would be an anomaly to reverse some convictions while upholding others when all defendants suffered from the same error. In *Gray*, the court in the exercise of discretion, by its own motion, considered the arguments to be adopted by all defendants, even those who had not directly raised the issue. Further, the court expressed the view that this action would not prejudice the government due to the fact that the government would not have been denied the opportunity to fully brief all issues in response to the various contentions of the defendants by such application of F.R.A.P. Rule 2.

The Fifth Circuit in *Gray*, exercised its discretion in reversing the conviction of several defendants even where those defendants had not complied with F.R.A.P. Rule 28(i). However, in the instant case the Fifth Circuit was not faced with having to exercise its discretion in granting relief to Petitioner Vance E. Williams, due to the fact that the Petitioner had specifically and timely adopted the argument regarding prejudicial publicity raised by co-defendant Oscar D. Silva, as per F.R.A.P. Rule 28(i). The refusal of the Circuit Court to reverse Petitioner's conviction was contrary to the court's previous holdings and the holdings from other circuits. This refusal of the court to reverse was more than a mere anomaly, it was an arbitrary and capricious abuse of the court's power.

To allow Petitioner's conviction to stand in light of the events which have occurred and which are clearly reflected by the record would be to effectively deny Petitioner his **Sixth Amendment** right to appeal and his **Fifth and Sixth Amendment** rights of due process. It is within the discretion of any court of appeals, on its own motion, to suspend any of the rules of appellate procedure upon a finding of good cause pursuant to **F.R.A.P. Rule 2**. However, a Court of appeals should not have the authority to abrogate the rules, i.e. **F.R.A.P. Rule 28(i)**, when such action is contrary to the facts as reflected in the record and results in the denial of constitutionally protected rights of an appellant.

II.

Petitioner Herein Was Convicted For Behavior Congress Did Not Intend To Reach Under 18 U.S.C. Sect. 1962(d) By Virtue Of The Complexity Of The Issues And Failure Of The Court To Adequately Instruct The Jury In A Manner Which Would Enable Them To Intelligently Interpret The Complex RICO Statute In A Manner That The Ordinary Jury Could Be Expected To Understand And Follow, And Reflecting Serious Conflict Between The Circuits.

This Honorable Court should grant Petitioner's Writ of Certiorari to resolve the conflict between the circuits on the proper interpretation of 18 U.S.C. sect. 1962(d) regarding the issue of the agreement necessary to support a conviction for a **RICO** conspiracy case. Some of the circuits require as the predicate for conviction under 1962(d), of conspiracy to violate 1962(c), an agreement to personally commit two acts of racketeering activity. See, e.g., *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied sub nom., Rabito v. United States*, 469 U.S. 831, 83 L.Ed.2d 60, 105 S.Ct. 118 (1984); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011, 75 L.Ed.2d 479, 103 S.Ct. 1250 (1983). Other circuits, including the Fifth Circuit in the instant case, hold that the requirements

for conviction of 1962(d) only requires an agreement that another violate 1962(c) by committing two acts of racketeering activity. See, e.g., *United States v. Carter*, 721 F.2d 1514, 1529-1531 (11th Cir.), *cert. denied sub nom.*, *Morris v. United States*, 469 U.S. 819, 83 L.Ed.2d 36, 105 S.Ct. 89 (1984).

The government has inconsistently interpreted the RICO conspiracy statute. In *Winter, supra*, the government conceded that a count under 1962(d) of conspiracy to violate 1962(c) requires proof that the defendant "agreed to commit personally two or more predicate crimes constituting a pattern of racketeering activity." 663 F.2d at 1136. In the instant case, as in the case of *Adams v. United States*, 759 F.2d 1099 (3rd. Cir.), *cert. denied*, _____ U.S. _____, 88 L.Ed.2d 321, 106 S.Ct. 336 (1985), the government argued that the interpretation of 1962(d) of conspiracy to violate 1962(c), requires only an agreement between the charged party and another that some third party commit two acts of racketeering activity.

The legislative history of the RICO statute clearly reveals that it was intended as a primary weapon to extend the scope and the authority of the government in the war against organized crime and its economic roots as reflected in *Russello v. United States*, 464 U.S. 16, 26, 78 L.Ed.2d 17, 104 S.Ct. 296 (1983). Further, considering the extent that the RICO statute is currently being used by the government, it necessarily follows that any conflicts within the circuits in the interpretation of 1962(d) will of necessity create unconstitutional and unauthorized incarceration depending upon the particular circuit's construction of 1962(d). It is obvious that if the Third, Fifth and other circuits which concur in this interpretation of 1962(d) is correct, then the intent of Congress is being frustrated in those circuits which adhere to the narrower view of RICO conspiracy. If the Third, Fifth

and other circuits' interpretation is incorrect, defendants in those circuits are being exposed to convictions for behavior Congress did not intend to reach under 1962(d).

It is also imperative that this Court review the government's vacillating interpretation of 18 U.S.C. sects. 1962(c) and (d). At this time the government's interpretation of the **RICO** statute is being inconsistently applied resulting in ambiguous prosecutions under the **RICO** conspiracy statute and destroying the objectives which the **RICO** statute was designed to control.

In the instant case the jury instructions were erroneous as a matter of law and insufficient to instruct the jury in the following particulars:

1. The district court erred in instructing the jury on the enterprise element of a **RICO** offense;
2. The district court failed to instruct the jury on the evidentiary requirements despite repeated requests on the part of defense counsel for such an instruction.

The **RICO** offense, as statutorily defined, has two distinct elements: (1) the existence of an "enterprise," and (2) a "pattern of racketeering activity." 18 U.S.C.S. sect. 1962 (Law. Coop. 1979). Therefore, in order to convict a defendant of a **RICO** conspiracy offense as alleged in Count One of the indictment, the jury must find first that there was an enterprise, and second, that the affairs of that enterprise were conducted through a pattern of racketeering activity. This is true due to the fact that the "pattern of racketeering activity" itself consists of substantive violations of federal laws. 18 U.S.C.S. sects. 1961(1), (5) (Law. Coop. 1979). The statute raises the spectre that a defendant could be convicted by a jury of a **RICO** conspiracy for engaging or agreeing to engage in the predicate acts. The enterprise alleged in the instant

indictment charged the Petitioner with conspiracy to participate in the affairs of an illegitimate enterprise through a pattern of racketeering activity from 1974 to 1984. The indictment further alleged that this group of individuals associated for the purpose of possessing, with the intent to distribute and distributing marijuana and cocaine. 18 U.S.C.S. sect. 1961(4) (Law. Coop. 1979); 21 U.S.C.S. sect. 841(a)(1) (Law. Coop. 1979). The pattern of racketeering activity alleged consisted of travelling in or using interstate or foreign commerce to facilitate an illegal activity, 18 U.S.C.S. sect. 1952 (Law. Coop. 1979); 21 U.S.C.S. sect. 841(a)(1) (Law. Coop. 1979), possession with the intent to distribute and the distribution of marijuana and cocaine.

In *United States v. Turkette*, 452 U.S. 576, 69 L.Ed.2d 246, 101 S.Ct. 2524 (1981), the Supreme Court substantially restricted the global language found in 18 U.S.C. sect. 1962. The Court observed that the RICO statute extended to wholly illegitimate enterprises. The Court further observed that the enterprise and the pattern of racketeering activity were two separate and distinct elements of a RICO violation. Further, the Court observed that an individual may participate or agree to participate in an enterprise without any criminal liability under the RICO statute and may conversely commit or agree to commit a pattern of racketeering activity without such liability. *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005, 79 L.Ed. 2d 229, 104 S.Ct. 996 (1984), 532 F. Supp. 804, 757 F.2d 282 (5th Cir.), *cert. denied*, _____ U.S. _____, 88 L.Ed.2d 357, 106 S.Ct. 406 (1985).

In *United States v. Turkette*, *supra*, the Court held as follows:

In order to secure a conviction under RICO, the government must prove both the existence of an "enterprise" and the connected "pattern

of racketeering activity.” . . . The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

452 U.S. at 583.

Thus, the Court established two evidentiary requirements for a finding of an enterprise: (1) evidence of the existence of “an ongoing organization”; and (2) evidence that the members of the organization “function as a continuing unit.” Various courts have noted the inadequacy of a simple repetition of the statutory definition of an “enterprise” to measure up to these requirements and adequately protect a **RICO** defendant. In *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1981), *cert. denied*, 459 U.S. 1040, 74 L.Ed.2d 608, 103 S.Ct. 456 (1982), the court, applying the *Turkette* criteria, held that a jury must be instructed to make three factual findings in order to find the existence of an “enterprise”: (1) the group must have an “ascertainable structure,” (2) it must operate as a “continuing unit,” and (3) it must have a “common goal as to its members.” *Id.* at 665. The purpose of the structured analysis is to ensure that a **RICO** defendant is in fact found by the jury to be a member of an enterprise, in order to prevent his conviction under **RICO** merely for the commission of the predicate acts alone.

The district court failed to instruct the jury as to the evidentiary requirements set out in *Turkette*, despite repeated requests on the part of defense counsel for such an instruction. The court’s instruction as to the **RICO** enterprise was clearly inadequate. The instructions given the jury by the court below, on the enterprise element of a **RICO** offense, essentially repeated the statutory definition of an “enterprise.” (TR-May 14, p. 99). Federal appellate courts have

consistently held that such instructions are inadequate. *United States v. Bledsoe, supra*; *United States v. Riccobene*, 709 F.2d 214, 220-26 (3rd Cir.), *cert. denied*, 464 U.S. 849, 78 L.Ed.2d 145, 104 S.Ct. 157 (1983).

The court below purportedly based its instruction on the Fifth Circuit's opinion in *United States v. Cauble, supra*, in which the panel upheld an instruction on the "enterprise" element which repeated the statutory definition. The court in *Cauble*, however, was faced with a procedural history clearly distinguishable from the instant case. In *Cauble*, the court expressly and repeatedly predicated its ruling on the fact that error on the "enterprise" instruction had not been preserved. Thus, the court was reviewing merely for plain error. See *Cauble*, 706 F.2d at 1343 ("Because[the defendant's] lawyers lodged no objection to the charge below, we review each of the allegedly defective instructions *only for plain error*." (emphasis added)), 1340 n.60 ("Nor do we need to decide whether, as the court held in [*Bledsoe*], it is essential that an enterprise have an ascertainable structure, operate as a continuing unit, and have a goal common in its members. . . . Here the enterprise had all of these characteristics."). Therefore, the court below could not properly rely on *Cauble* in the face of a defense objection to the instruction. The minimal scrutiny given under the plain error standard is insufficient to establish proper legal standards to guide courts in the development of a coherent policy. As shown below, there were repeated defense objections to the court's instructions in this case. In particular the defense strongly objected to the court's instruction on the enterprise element.

As reflected by the record, counsel repeatedly asked the court below to instruct the jury on the need to make the underlying evidentiary findings required by *Turkette, supra*. For example, on May 13, 1985, the following dialogue took place:

Mr. Collins: "Will the court be giving some type of charge with regard to the organization . . . ?"

The Court: "No. I don't think that the statute—I'm going to give them the statutory definition of an enterprise."

Mr. Collins: "Will the court be giving instructions pursuant to *United States v. Turkette*?"

The Court: "U.S. versus who?"

Mr. Collins: "Turkette."

The Court: "I'm going to follow the *Cauble* case. I'm going to follow in light of *Cauble* and in light of the statute."

(**TR-May 13, p. 64**). Defense counsel objected to the instruction again after the charge was given, (**TR-May 14, p. 168**) (requesting that the court below explain to the jury that the enterprise element is separate from the association arising from the commission of the predicate acts); (**TR-May 14, p. 189**) (requesting that the enterprise instruction conform to the *Turkette* opinion's evidentiary requirements).

The instruction given in this case was inadequate under that standard. First, to the extent that the Supreme Court established true evidentiary standards in *Turkette*, the instruction herein failed to specify to the jury the need to make those findings before making a finding on the **RICO** enterprise element. Therefore, the jury could have found the existence of an enterprise while failing to find either element the Supreme Court required as a predicate to such a finding. Second, the instruction failed to adequately distinguish the defendants' complicity in the predicate acts and their complicity in the enterprise. Thus, the jury could have found that Petitioner agreed to engage in the predicate acts, associated him "in fact" to the other defendants, and found him a part of the enterprise as a result of those two findings, without ever deciding that he intentionally "joined" an enterprise.

Congress clearly established two requirements for a RICO conviction; (1) an enterprise; and (2) the conducting of the enterprise's affairs through a pattern of racketeering activity. Permitting the government to prove the former from the accused's association in the latter would compress these requirements into a single requirement that the defendant has committed or participated in the commission of two predicate acts. Such a construction would thwart congressional intent and redefine the RICO offense.

The court likewise failed to instruct the jury concerning the fact that each defendant must have been shown to have either personally committed two racketeering acts without reliance or proof of another defendant's participation in the enterprise. *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 459 U.S. 906, 74 L.Ed.2d 166, 103 S.Ct. 208 (1982). In essence, the instructions of the court concerning Count One intertwined the law of conspiracy with the requirement of a RICO conspiracy to the point where the jury was instructed that as long as a defendant agreed with another to commit an illegal act, that defendant is guilty of a conspiracy. The court instructed the jury as follows concerning a RICO conspiracy: "...the nature of the conspiracy... is to create a criminal enterprise..." (TR-May 14, 1985, p. 101), "...it's illegal to associate yourself with an enterprise or a group of people... who participate in conducting the enterprise's affairs through a pattern of racketeering activity." (TR-May 14, 1985, p. 100).

The court thereafter failed to correct the erroneous instruction that the pattern of racketeering activity may be committed by a group or an enterprise as opposed to each individual defendant. (TR-May 14, 1985, p. 100). The court further instructed the jury that the nature of the conspiracy or the plan or scheme (charged in Count One) was "...to create a criminal enterprise whose purpose it was to promote

and facilitate the possession and distribution of marijuana and cocaine,” (TR-May 14, 1985, p. 101) and “. . . a conspiracy is nothing more than a combination of two or more people. . . who join together to attempt to accomplish some unlawful purpose and the gist of this offense is in essence that it is a combination or a mutual agreement by two or more people to disobey or disregard some law.” (TR-May 14, 1985, p. 102). The court’s instructions considered in their entirety are seriously misleading. The court talked of violations of drug laws and immediately thereafter stated that a conspiracy is merely an agreement by two or more people to violate some law.

The nature of the conspiracy alleged in Count One was not simply to create a criminal enterprise to conduct drug transactions. The nature of the alleged conspiracy was the specific intent of each named defendant to participate in a criminal enterprise through their manifest agreement to personally commit two acts of racketeering. The court’s instruction wholly failed to address these issues which effectively transformed the **RICO** conspiracy allegation into a general conspiracy charge. The language of 18 U.S.C. sect. 1962 and the severity of the punishment for a **RICO** conspiracy violation evidences Congress’ specific intent to require proof of more than a mere agreement to form a group to deal in drug transactions as the jury instructions suggested. The court refused to give a requested instruction that each defendant must manifest an intent to belong to an enterprise thereby compounding the confusion in the court’s instructions between the enterprise element and the pattern of racketeering element. (TR-May 14, 1985, p. 189). Defense counsel objected to the court’s failure to correctly instruct the jury on the separate elements of enterprise and pattern of racketeering. (TR-May 14, 1985, p. 189). The court denied counsel’s request for a proper instruction because the court was convinced that more instructions would just confuse the jury. Petitioner submits that the jury was already thoroughly confused on the law of a **RICO** conspiracy and the court’s

refusal to clarify and correctly instruct the jury on the law was tantamount to giving no instructions at all. When the jury is confused by the court's instructions, the court has an obligation to clarify such confusion with adequate instructions. *Bollenbach v. United States*, 326 U.S. 607, 90 L.Ed. 350, 66 S.Ct. 402 (1946).

The court's attempt to instruct the jury as to the government's burden of proving that each defendant agreed to participate in a pattern of racketeering activity was insufficient and prejudicial to Petitioner. (TR-May 14, 1985, p. 106). This instruction implied that only one defendant need agree to commit two acts of racketeering in order for any defendant to become a member of the conspiracy. In summary the court's instructions on Count One of the indictment erroneously stated the law of a RICO conspiracy and were wholly insufficient as a matter of law and thereby deprived Petitioner a fair trial and a true verdict. U.S. Const., Amend. V and VI.

The court's instructions on Count Two deprived Petitioner of a fair trial in that the court stated that the indictment charged that the plan in Count One was put into effect by the defendants charged in Count Two. (TR-May 14, 1985, p. 109). This instruction was inaccurate and constituted an instructed verdict by the court which deprived Petitioner of a fair trial. U.S. Const., Amend. V and VI. A finding by the jury that the government had met its burden of proof on Count Two, in which Petitioner was not a named defendant, would leave no other conclusion but a finding by the jury that the government had met its burden of proof on Count One, in which Petitioner was a named defendant, that is, if a "plan" was carried forward, there was by necessity an agreement to develop that plan. The court's instructions, therefore, directed a verdict of guilt as to Petitioner on Count One by tainting Petitioner in Count One with the acts of other defendants in Count Two.

III.

Petitioner Was Denied The Rights Guaranteed To Him By The Fifth And Sixth Amendments To The Constitution Of The United States Due To A Conflict Of Interest Arising From The Joint Representation Of Petitioner And His Twin Brother, The Trial Judge's Failure To Sever The Trial Of Petitioner And His Twin Brother And Denial Of His Right To Appeal.

This Honorable Court should grant Petitioner's Writ of Certiorari due to the substantial federal questions in connection with Petitioner's constitutional rights under the **Sixth Amendment** to effective assistance of counsel and a fair trial in light of the multiple representation of Petitioner and a co-defendant, i.e. his identical twin brother Drake Williams, by the same counsel, and his constitutional rights of due process under the **Fifth Amendment** to the Constitution of the United States.

It is not per se violative of ones constitutional rights under the **Sixth Amendment**, for multiple defendants to be represented by a single counsel, however, there are exceptions as was recognized in *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962):

The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court-appointed. Such representation is lacking, however, if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others.

The guarantee of conflict-free counsel originating in *Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1942), requires the untrammelled and unimpaired assistance of counsel in order to avoid the inherent danger of prejudice in a joint trial, especially in a conspiracy case involving numerous defendants as reflected in the record in this cause.

When an actual conflict of interest exists in connection with counsel's representation of a defendant which renders the trial fundamentally unfair, the defendant has been deprived of his right to due process. *United States v. Alvarez*, 580 F.2d 1251, (5th Cir. 1978).

The Fifth Circuit has "... always considered the undivided loyalty of counsel as essential to due process." *Id.* at 1256. In *Porter*, the Fifth Circuit further stated that "where [a conflict of interest] has been allowed to occur, either through a calloused conscience of the attorney, or ignorance of the true facts by the Judge, the trial is not the fair one demanded by the Constitution." 298 F.2d at 464.

The **Sixth Amendment** right to assistance of counsel "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, *supra*, 315 U.S. at 76, 62 S.Ct. at 467. The Fifth Circuit in *Stephens v. United States*, 595 F.2d 1066 (5th Cir. 1979), held that the concurrent representation of a principal witness and a defendant constituted an actual conflict of interest creating reversible error and followed the rule of the Supreme Court and the Fifth Circuit that prejudice need not be shown once an actual conflict of interest has been demonstrated. It is enough to show that defendant "was represented by an attorney with an actual, flagrant conflict of interest based on his concurrent representation of a witness for the prosecution to whom he owed the unfettered duty of complete, legitimate support, not the task of undermining and tearing down his acceptability." *Id.* at 1070.

The instant case requires no such elaborate analysis. Petitioner and his twin brother were jointly represented by a single counsel who called the Petitioner's twin brother to the stand and thereafter elicited from him testimony aimed at exonerating himself and placing the entire blame upon the Petitioner herein. (TR-May 6, 1985, pp. 7, 15, 23). Further, counsel failed to elicit any testimony from the co-defendant/witness disassociating the Petitioner from the multiple counts as charged against the co-defendant/witness, but not charged against Petitioner herein. In addition, the government's cross-examination confused the evidence and the allegations as between the Petitioner and the co-defendant/witness. The conflict of interest was clearly evident by the affirmative action of counsel in calling co-defendant Drake Williams to the stand to testify against the Petitioner and thereafter eliciting testimony favorable to the witness yet harmful to the Petitioner, thereby violating Petitioner's **Sixth Amendment** rights and subjecting him to the detrimental consequences thereof. *Baker v. Wainwright*, 422 F.2d 145 (5th Cir.) *cert. denied*, 399 U.S. 927, 26 L.Ed.2d 794, 90 S.Ct. 2243 (1970).

Prior to trial, the district court recognized the potential conflict between the joint representation of Petitioner and his twin brother and informed both defendants and their counsel of the potential problem. (TR-December 20, 1984, pp. 10, 14-19).

Counsel initially represented all three of the Williams brothers (Petitioner, Drake Williams and Robert Williams), yet, withdrew from the representation of Robert Williams, who was later severed from the trial of this case. Petitioner signed a waiver of conflict (TR-December 20, 1984, p. 19) and the court allowed counsel to continue his joint representation of Petitioner and co-defendant Drake Williams.

Throughout the government's opening statements, the government portrayed Petitioner and co-defendant Drake Williams as an inseparable unit, the leaders of the organization (TR-March 25, 1985, pp. 120, 126, 132-133) and throughout the trial, the court, the government, the witnesses and even defense counsel treated Petitioner and co-defendant Drake Williams as one by confusing their identities or by referring to one or the other as Mr. Williams. (TR-March 29, 1985, p. 149; April 29, 1985, p. 173). In fact, throughout the entire trial, Petitioner's counsel stated he represented Drake Williams, thus losing sight of his representation of Petitioner. (TR-April 25, 1985, pp. 35, 91, 162, 198; April 22, 1985, pp. 72, 242; April 23, 1985, pp. 45, 73, 186; April 29, 1985, pp. 45, 58, 92). This confusion was exacerbated, if not caused, by the fact that Petitioner and co-defendant Drake Williams are identical twins and were being represented by the same counsel. The record therefore clearly reflects that the evidence presented at trial established an actual conflict of interest. *Glasser v. United States, supra*; *United States v. Medel*, 592 F.2d 1305, *reh. denied*, 597 F.2d 772 (5th Cir. 1979); *United States v. Kranzthor*, 614 F.2d 981 (5th Cir. 1980). The Petitioner herein was not a lawyer and could not be expected to have fully realized the extent of his jeopardy by accepting R.C. Bennett as his counsel while he was simultaneously representing his twin brother.

Further, the Petitioner's constitutional rights to confrontation and cross-examination of witnesses were denied due to the fact that Petitioner was totally unaware of the fact that his attorney intended to call his brother and co-defendant to the stand for any purpose, much less for the purpose of testifying against the Petitioner.

Due to the actual conflict which arose when counsel for both brothers took such action, Petitioner was unable to cross-examine the witness for the purpose of impeachment thereby effectively resulting in an improper comment upon

Petitioner's failure to testify in an effort to correct the accusations of guilt introduced before the jury by his co-defendant and twin brother. In *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962), the Fifth Circuit held that a defendant has a constitutionally guaranteed right of silence, free from prejudicial comments, even when such comments come only from a co-defendant's counsel. In addition, the court held that when a head-on collision between defendants results in a prejudicial comment as to one's silence, the imputation of guilt to the defendant is magnified by the manner of occurrence and that instructions can not cure the prejudicial effects of the implications regarding defendant's continued silence. *Id.* at 140-41.

Where, as here, the trial court is faced with defense counsel's dilemma in the midst of trial, created by one co-defendant's direct accusation of a second defendant, the court is required to at least make an inquiry as to whether counsel is able to proceed without substantially impairing the rights of one of his clients to a full defense and a fair trial. A conflict of interest which mandates such a duty of a trial court evolves when it becomes apparent that the conflict may preclude defense counsel from taking such action as would be strategically advantageous to one client but obviously detrimental to a second client. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir. 1981). Here, there can be no doubt that once counsel called one of his clients to the stand to testify against a second client he was thereafter faced with an actual conflict of interest which precluded him from giving undivided loyalty to the defense of Petitioner. Due to these "special circumstances" the trial court had a *sua sponte* duty to inquire into the propriety of joint representation. *Cuyler v. Sullivan*, 446 U.S. 335, 346-47, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980). This duty in special circumstances to inquire reflects that in the absence of such inquiry, the record would demonstrate a particular conflict existed which violated the defendant's **Sixth Amendment** rights to effective

assistance of counsel. *Wilson v. Morris*, 724 F.2d 591, 594 (7th Cir.) (en banc), *cert. denied*, _____ U.S. _____, 80 L.Ed.2d 829, 104 S.Ct. 2357 (1984). When a defendant maintains his own innocence and attempts to pin the guilt on a co-defendant, represented by the same counsel, an obvious conflict arises. The Supreme Court in *Holloway v. Arkansas*, 435 U.S. 475, 489-90, 55 L.Ed.2d 426, 98 S.Ct. 1173, 1181 (1975), took note of the fact that this is especially possible in cases of uneven culpability where one defendant's best strategy might be to shift the blame to a co-defendant. In such event, an attorney may be prevented from effectively cross-examining such witness. Specific instances of an actual conflict adversely affecting defendant's lawyer's performance must be evidenced by the record. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975).

The Sixth Amendment guarantee of assistance of counsel encompasses the right to counsel whose loyalty is not divided between clients with conflicting interests. *United States v. Gaines*, 529 F.2d 1038 (7th Cir. 1976); *Glasser v. United States*, *supra*; *Craig v. United States*, 217 F.2d 355 (6th Cir. 1954). This constitutionally protected right to counsel whose loyalty is not divided between clients can be waived, but only if such waiver is deliberate and made with an understanding of the conflicting interests and possible consequences thereof. *Craig v. United States*, *supra*. The determination as to whether there has been an intelligent waiver of the right of counsel must be dependent in each case upon the particular facts and circumstances of that case. *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019, 1023 (1938). Further, the Supreme Court stated in *Brady v. United States*, 397 U.S. 742, 25 L.Ed.2d 747, 90 S.Ct. 1463 (1970), that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 748. In the instant case, the conflict which arose between Petitioner and his brother/co-defendant

was so great that they could not constitutionally be allowed to waive their **Sixth Amendment** rights, regardless of their knowledge of the dangers of the joint representation which they were receiving. *United States v. Helton*, 471 F. Supp. 397 (S.D.N.Y. 1979). Factually, the instant case closely parallels *Helton* wherein a multi-count indictment charged one brother with more crimes than the other, the relative proof was disparate and the defense tactics available to the less culpable brother, i.e. the Petitioner herein, were inconsistent with and were undermined by the defense strategies utilized by the more culpable brother. Accordingly, in *Helton*, the court held that it therefore was impossible for the brothers to make a knowing and intelligent waiver of their rights to effective assistance of independent counsel. In holding that justice could only be satisfied by ordering a new trial, the Seventh Circuit in *Gaines, supra*, stated that the defendant did not make a knowing waiver of his **Sixth Amendment** right to effective assistance of counsel in the absence of a specific warning by the trial court of the serious danger to his defense posed by the conflict of interest, which became apparent during the trial, even though in *Gaines* all three defendants had individually been admonished by the judge in general terms at the time of arraignment, as to the dangers inherent in representation of more than one defendant by the same counsel. The court therein stated that even though the potential for a conflict of interest was noted by the trial court at an early stage and discussed with defendants, the trial court had not anticipated all the dangers that might arise. When an actual conflict did arise, the trial court was under a duty to bring the facts of such conflict and the reasonably foreseeable consequences therefrom to the attention of each defendant so that each could make an informed decision as to whether such defendant desired to continue with his present counsel or seek new counsel. 529 F.2d at 1044.

Similarly, in the instant case the district judge recognized the potential for a conflict of interest due to multiple repre-

sensation of the three Williams brothers. At the request of defense counsel, who informed the court that an actual conflict did exist in connection with one of the brothers, the court allowed counsel to withdraw from representation of one of the brothers and subsequently provided him with court appointed counsel. Thereafter, counsel, R.C. Bennett, continued as counsel for Petitioner Vance Williams and Drake Williams. In addition, R.C. Bennett failed to advise the court of his intention to call Drake Williams as a witness against his brother, the Petitioner herein, which would thereby create an absolute conflict of interest, destroying any possibility of continued joint representation. The trial court made no independent inquiry as to whether counsel could proceed without substantially impairing the rights of either of his remaining clients to a full defense and fair trial. *Johnson v. Hopper, supra*. Thereafter, the district judge did advise all defendants so situated of the possibility of a conflict due to multiple representation and elicited from each, his acquiescence to continue with present counsel.¹ Petitioner asserts

1. After discussing the possibility of a conflict of interest in connection with multiple representation the district judge stated:

The Court: So understanding that, gentlemen, I want to ask each of you are you satisfied with your present attorney and do you wish that that lawyer continue representing you even though that lawyer does — is defending a defendant in the case other than yourself? So I am going to start here on my right and ask you to please identify — yourself. . . . and I want you to tell me if you wish to change lawyers or if you wish to continue with your present lawyer under the circumstances that I have announced. . . .

Defendant: [Vance Williams] I wish not to change counsel and remain with Mr. R.C. Bennett.

The Court: And your name, sir?

Defendant: My name is Vance Williams.

The Court: The reason I am asking your name so the record shows.

Defendant: My name is Vance Williams. I wish to remain with my counsel.

TR-December 20, 1984, pp. 19-20.

that the exchange between the court and himself did not result in a knowing and voluntary waiver of his **Sixth Amendment** right to effective assistance of counsel since at the time he was totally unaware of any actual conflict and could not have foreseen the type of actual conflict which later arose or be aware of the consequences thereof. Further, during these proceedings the district court should have followed the procedure akin to that promulgated in the **Federal Rules of Criminal Procedure Rule 11** (App. C, *infra*, 1c) requiring that to have an effective waiver of a federal constitutional right, it must be an intentional relinquishment or abandonment of a known right, made with sufficient awareness of the relevant circumstances and likely consequences. *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). The right to assistance of counsel can be waived, but as emphasized in *Johnson v. Zerbst, supra*, there is a presumption against waiver of a constitutional right. Further, the court should indulge every reasonable presumption against a waiver of a fundamental constitutional right and not accept mere acquiescence as sufficient to result in the loss of such right. 304 U.S. 458. In this regard the trial judge is charged with the "serious and weighty responsibility. . . of determining whether there is an intelligent and competent waiver by the accused." *Glasser, supra*, at 71. Vital to the process is that the waiver be established by "clear, unequivocal, and unambiguous language." *Nat'l Equip. Rental v. Szukent*, 375 U.S. 311, 11 L.Ed.2d 354, 367-68, 84 S.Ct. 411 (1964). In *United States v. Howton*, 688 F.2d 272 (5th Cir. 1982), the Circuit Court quoted extensively from *Garcia*, re-emphasizing the requirement followed in the Fifth Circuit requiring a "narrative response from each defendant" and the establishment on the record of a "clear, unequivocal, and unambiguous" reflection of each defendant's desire to waive his rights as protected by the **Sixth Amendment to the Constitution of the United States**. *Id.* at 274. The court continued, "[B]earing the rule of *Garcia* in mind, we have carefully examined the lengthy colloquy carried on" *Id.* at 274-75. No such colloquy

is reflected in the instant case and Petitioner asserts that his mere acquiescence at the pretrial hearing to the continued representation by R.C. Bennett at a pretrial hearing did not pass the test as required by **Rule 11**. (App. C, *infra*, 1c). Further, Petitioner herein asserts that his failure to properly and timely complain, when his counsel called his twin brother to the stand to testify against him, did not constitute a waiver. As in *Craig v. United States*, *supra*, at 359, the combination of circumstances, which were not reasonably foreseeable before the trial began, did deprive Petitioner of effective assistance of counsel to which he was entitled under the **Sixth Amendment** and under the particular circumstances of the case he did not intelligently and voluntarily waive such right. In addition, the conflict of interest which arose during the trial in the instant case deprived the Petitioner herein of his constitutional rights of confrontation and cross-examination of witnesses as guaranteed by the **Fifth** and **Sixth Amendments** to the Constitution of the United States.

Federal Rules of Criminal Procedure Rule 14 (App. C, *infra*, 1c) provides that when it appears that a defendant is prejudiced by a joinder of trial, the district court can order separate trials or grant a severance or provide whatever other relief as justice may require. In the instant case Petitioner asserts that his constitutional rights of confrontation under *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), were violated by the admission of testimony elicited from his brother and co-defendant that would not have come in had the trial been severed pursuant to **Rule 14** of Federal Rules of Criminal Procedure.

CONCLUSION

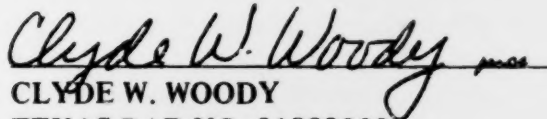
It is respectfully submitted that this Honorable Court should grant Petitioner's Writ of Certiorari to reverse and dismiss or in the alternative to reverse and remand said cause to the Fifth Circuit Court of Appeals with directions to the Circuit Court to take action consistent with this Court's opinions, to correct the Circuit Court's determination in this cause which has curtailed the Petitioner's constitutional guarantees, as more fully set forth in this petition. The Petitioner would specifically address the policy considerations of this Court provided by Rule 17 of the Rules of the Supreme Court. In particular the Petitioner has raised substantial compelling questions concerning the application of the Fifth and Sixth Amendments, as well as the Federal Rules of Appellate Procedure, Rule 28(i) and Rule 2. The restrictive application of Rule 28(i) and Rule 2 as followed in this case by the Fifth Circuit will create an extreme backlog of pending cases in the appellate courts of all of the circuits if the spirit of Rule 28(i), as applied here by the Fifth Circuit Court, is adopted by this Court.

Petitioner further has demonstrated in the second question raised, that serious conflicts exist between the circuits as to the application of 18 U.S.C. 1962(d), commonly referred to as the RICO statute. Since this Court was confronted with the *Adams*' decision, the RICO statute has become one of the most frequently utilized weapons in the government's arsenal in pursuit of organized crime, and therefore the circumstances reflected in *Adams* have been magnified at least tenfold and the government's inconsistent approach, which was criticized by this Court in the dissent in *Adams*, which we adopt for all purposes herein, creates additional critical reasons for this Court to address the issue to eliminate the conflicts within the circuits, as well as stabilize an appropriate and consistent approach which the government thereafter would be required to follow.

In light of some of the inequitable results that have occurred due to multiple representation of defendants in prolonged complex cases, as demonstrated in this application for Writ of Certiorari, the Petitioner requests that this Court articulate and give some direction to the lower federal courts and counsel practicing therein.

It is respectfully requested by this Petitioner that this Honorable Court utilize this case in the manner requested herein in order to grant this Petitioner the relief to which he is entitled and to further exercise this Court's supervisory powers to eliminate the abuses that have developed in the lower federal courts.

RESPECTFULLY SUBMITTED,


CLYDE W. WOODY
TEXAS BAR NO. 21982000

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APPENDICIES

Appendix A
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2588

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DRAKE WILLIAMS, VANCE E. WILLIAMS,
OSCAR SILVA, EDWARD ORELLANA, MICHAEL SAHS,
JOSEPH C. WATSON, JAN E. GROSSMAN,
SALVADOR MERAZ, and TANNY MILLER,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(January 29, 1987)

BEFORE GEE and HILL, Circuit Judges, and HUNTER,*
District Judge.

GEE, Circuit Judge:

Nine appellants directly appeal their convictions from the district court. We affirm except as to Oscar Silva, all of whose

*** District Judge of the Western District of Louisiana, sitting by designation.**

convictions we reverse for further proceedings, as to Vance Williams, whose conviction on count 3 we reverse, as to Tanny Miller, whose convictions on counts 8 and 9 we reverse, and as to Drake Williams, as to whom we reverse on counts 5 and 6.

Facts

This criminal trial followed a 24-count indictment that originally named the nine appellants and five others. The trial commenced with ten defendants and 19 counts. The main thrust of the prosecution centered on three RICO counts: count 1—violation of § 1962(d) (RICO conspiracy); count 2—violation of § 1962(c) (substantive RICO); count 3—violation of § 1962(a) (illegal investment of proceeds). Count 1 accused all appellants except Miller. Count 2 omitted Miller, Vance Williams, and Watson. Drake and Vance Williams,¹ Silva, and Orellana were charged in count 3. Next, the indictment charged Drake Williams with conspiring to evade currency transaction reporting requirements in violation of 18 U.S.C. § 1001 (counts 5-6) and 18 U.S.C. § 371 (count 7). The indictment included conspiracy to file false income tax returns in violation of 18 U.S.C. § 371 (count 8—Drake Williams, Watson, Miller, and Silva), as well as the completed substantive offenses in violation of 26 U.S.C. § 7206(1) (counts 10, 18, and 21—Drake Williams; count 12—Watson; count 14—Silva; count 19—Miller) and § 7206(2) (count 24—Watson). The other counts involved controlled substances violations: count 9—21 U.S.C. § 846 (Conspiracy to possess cocaine with intent to distribute) (Drake Williams, Silva, Watson, Grossman, and Miller); counts 16, 17, and 20-21 U.S.C. § 841(a)(1) (substantive cocaine possession) (Drake Williams and Grossman); count 4—21 U.S.C. § 848 (continuing criminal enterprise) (Drake Williams).

1. Drake and Vance Williams are identical twins.

The trial proceeded with the nine appellants and Beverly Lunday. At the close of evidence, the district court dismissed count 9 as to Miller and count 3 as to Orellana for lack of evidence. The jury acquitted Lunday on each of the four counts that named her and acquitted Watson on count 9, convicting the rest on all other counts and finding that certain assets of Drake and Vance Williams, Silva and Sahs should be forfeited under the RICO and continuing criminal enterprise counts. The appellants received terms of imprisonment ranging from 5 years to 25 years and fines of up to \$100,000.

The prosecutor filed this indictment on October 26, 1984. This followed an indictment filed in the same district, but dismissed five months earlier. The indictment resulted from a joint investigation between the Southern and Western Districts of Texas begun in the late 1970s to discover the connections between Sahs, Meraz, and Silva (El Paso residents) and Drake Williams, Vance Williams, and other individuals (Houston residents). The connections were many and for illicit purposes. Later, the two districts split their investigation and pursued different targets. The Western District Grand Jury indicted Sahs, Meraz, Silva, and others and they pled guilty in exchange for reduced charges. The Southern District prosecutor filed the present, more comprehensive, charges.

The government's case was founded on the testimony of Tim Cassias and Jude Peterson, both members of the drug conspiracies. Cassias was also a paid Drug Enforcement Administration informer. Peterson was a member who testified in return for immunity. The government produced other witnesses, including Laura Sahs, the wife of appellant Michael Sahs, to corroborate many of the details of Cassias's testimony. That testimony revealed a group of individuals that distributed marijuana from New Mexico to New England as well as distributing cocaine in Texas. For this appeal, we need only adumbrate the illicit activities of this organization.

In El Paso in the late 1970's, Vance Williams and Silva had a small business of trafficking in marijuana. They recruited Sahs to deliver drugs for them. Sahs delivered marijuana frequently to Orellana in Boston and Watson in Houston. These deliveries included as much as a ton of marijuana. Sahs prospered as a deliveryman, sufficiently so that soon he acquired a clientele of his own and retained Silva and Vance Williams as sources for his supplies.

Appellant Meraz supplied some of the marijuana and cocaine to this El Paso operation. Grossman lived next door to Sahs and would at times test the cocaine's purity for the gang. Watson would sell drugs to individuals referred to him by Drake Williams. Drake, along with Silva and Vance Williams, was also involved in obtaining the large initial supplies.

Cassias was one of the first customers of the group. He testified as to specific dealings of the group: the storage of tons of marijuana at a Girl Scout camp in New Mexico; the conversion of a mobile home into a one-ton marijuana transport machine; the delivery of marijuana for suitcases and paper bags full of cash; the purchase of property with the cash from drug activities; the organization behind the deliveries; and many more specific illegal activities. His testimony chronicles a continuing criminal conspiracy remarkable for its extensive distribution network and large cash flow.

Jude Peterson worked as an accountant for Drake Williams in Houston. Peterson's testimony ties in Drake Williams, Jan Grossman and Joseph Watson to the conspiracy: Grossman's delivery of cocaine; the receipt of Thai sticks by Drake; the supervisory role of Drake Williams in the conspiracy; the delivery of large amounts of cash; and other drug dealing activities.

Vance Williams was the first to run afoul of the law. While in New England delivering marijuana in 1977, he was snared in a wiretap that the New Hampshire police conducted on a large-scale distributor in the area. He pled guilty to the charge of marijuana trafficking and served approximately one year in prison and a half-way house from mid-1979 to mid-1980. His friends, however, did not forget him: they set aside \$5 for each pound of marijuana they sold for Vance.

The drug activities generated large amounts of cash. Much of the money went directly into the cash purchase of real estate. Some money was laundered through Vance Williams and Silva's El Paso restaurant. Drake Williams, a certified public accountant, provided other ways to clean the money. Drake's story flows from rags (defaulting on his government student loans in 1972) to riches (owning a printing company and a Swiss bank account in excess of \$700,000 in 1982). Unfortunately, it is not a Horatio Alger story. He did work hard, but also illegally. Drake laundered some money through bogus labor charges by some of his more successful clients who would provide a check and receive cash less a transaction fee. By such means, the customer would reduce his taxable income and Drake's friends would launder their money. This is the count that caught Tanny Miller on aiding tax fraud.

Drake's most successful laundering scheme involved one of his initial clients—A Jiffy, Inc., a Houston printing company. In 1978, A Jiffy faced bankruptcy. Drake personally loaned the owners cash (in brown paper bags) and later bought a controlling interest in the company. The company began making money hand over fist, mainly through the injection of drug money. Drake's personal finances began to mix with the company's finances and company checks were used to purchase personal items. The company also hired Vance Williams and Michael Sahs. Drake also laundered money by having people purchase cashiers' checks in amounts under the

\$10,000 reporting requirement. He successfully laundered close to \$300,000 in this way.

The appellants argue many things on appeal. We address them below.

Discussion

I. The Plea Agreements

In 1982, Appellants Silva, Meraz, and Sahs were indicted in the Western District of Texas on various charges related to the charges eventually brought in the Southern District of Texas. In connection with those indictments, these three appellants entered into plea agreements with United States Attorney Bock of the Western District and pled guilty to at least one count in exchange for dismissal of other charges pending in the Western District. All three knew of the continuing investigation by United States Attorney Longoria in the Southern District and each now asserts that his agreement included an understanding that he would not be indicted in the Southern District. The trial judge conducted a hearing in which he found that the appellants' claims were untrue.

The existence of a plea agreement is a factual issue; therefore, the clearly erroneous standard of review applies to that finding. *United States v. Cain*, 587 F.2d 678, 680 (5th Cir.), cert. denied, 440 U.S. 975 (1980). In no instance does the written plea agreement support the appellant's allegation: in each of them, the government agrees to dismiss the remaining counts in the indictment in exchange for the guilty plea.²

2. Record, vol. 12 at 2905 (Silva) ("the Government will . . . move to dismiss the original indictment"); *id.* at 3029 (Sahs) ("the Government will move to dismiss the remaining counts of the indictment"); Meraz Exhibit 3 (Meraz) ("the Government will . . . move to dismiss the original indictment").

The written agreements, however, do not entirely dispose of the question. If the appellants' guilty pleas rest in any significant degree on a promise or agreement of the government, that promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262 (1971). Careful review of the evidence presented at the hearing, however, reveals substantial evidence supporting the trial court's finding that no promises other than those found in the written plea agreements existed.

The testimony at the hearing showed that the El Paso defendants' counsel "believed" that their clients would not be indicted. They "understood" that Mr. Bock "was under the impression that the Southern District investigation had carved out the [El Paso] Defendants. . . ." Record, vol. 16 at 109 (Burrell Johnston, Attorney for Silva). This belief lasted throughout the plea negotiations from January to May. These counsel testified that Bock represented to them that their clients would not be indicted in the Southern District. They, in turn, informed their clients of this and their clients then pled guilty. Mr. Bock controverted this testimony. He agreed that they discussed the Southern District investigations, but he claims "it was in a speculative thing; because [he] didn't know what was going on in Houston." *Id.* at 126. Although Mr. Bock's testimony was at some points equivocal,³ in response to the court's direct questions he stated that he did not promise that Silva would not be prosecuted in the Southern District in exchange for his present plea of guilty:

THE COURT: The bottom line is you never made any representation to the Defendant,

3. Bock's testimony was not the paradigm of clarity. He admitted that it was his "honest belief" that Silva would not be indicted in the Southern District, and that he might have imparted that assumption to Silva's counsel. Yet he was adamant that he imparted only his "opinion" to counsel and that he "had no idea what the investigation in Houston was." Record, vol. 16 at 127-31.

nor his counsel, neither written or oral, that this plea arrangement in the Western District would foreclose any further indictments or prosecution?

A. No, sir, I did not. We discussed that as a possibility whether he'd be indicted in Houston or not and we discussed it in that vein, would he be indicted. I did not in any way, I don't think I ever did, say he would not be indicted. We discussed the fact he could be investigated in Houston and in my opinion, and I think it was a valid one, because I had no knowledge to the contrary, I didn't think he'd be indicted.

Id. at 131.

Mr. Bock's testimony supports the trial court's finding of no promise not to prosecute in the Southern District. Furthermore, other facts bolster this finding. The original Southern District indictment, naming Oscar Silva as a defendant, was returned on May 26, 1983. Silva did not plead in the Western District until June 3, 1983, after he was admittedly aware of the indictment pending in Houston. In that Rule 11 hearing in El Paso before Judge Hudspeth, Silva told the judge that no other promise had been made to induce his plea besides the one in the written agreement. Record, vol. 10 at 2379. In addition, at the sentencing hearing on July 21, 1983, with the Southern District indictment still pending, Judge Hudspeth asked about the indictment in Houston. Mr. Burton, Silva's counsel, stated that he was trying to resolve the matter. In response to the Judge's question whether he thought Silva was going to trial down there, Mr. Burton replied that there was "some negotiation." *Id.* at 2392.

These facts support Judge DeAnda's finding that there was no promise in addition to those contained in Silva's written plea agreement. At the time Silva pled guilty, he knew that something was wrong with his version of the plea agreement. The time to assert the alleged oral plea agreement was before Judge Hudspeth. Silva failed to do so. The Supreme Court recently characterized a plea bargain as a "mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Mabry v. Johnson*, 467 U.S. 504, 507, 104 S.Ct. 2543, 2546, 81 L.Ed.2d 437 (1984) (footnote omitted). Silva had the opportunity to assert his version of the agreement before he pled guilty and before he was sentenced in the Western District. His failure to do so provides additional support to the trial court's determination that no such promise existed.

Although Meraz was not named in the original Houston indictment in May 1983, and therefore pled guilty and was sentenced before learning of another indictment, strong evidence supports the trial court's finding that there was no promise other than the written plea bargain. As to Meraz, Mr. Bock testified that his personal opinion at the time of negotiations was that Meraz *would be* indicted in the Southern District because he was more involved with the Houston dealings. Record, vol. 16 at 137-38. In addition, the testimony of Meraz's lawyer, Mr. Caballero, indicates a more tenuous kind of "understanding" — an understanding that Meraz's problems were over, but with many fewer substantive "representations" from the United States Attorney. See 1st Supp. Record, vol. 1 at 25-28. Furthermore, at Meraz's Rule 11 hearing, he in no way indicated any other promise than that contained in the written plea agreement. Meraz Exhibit D, at 32. Taken together, these facts sufficiently

support the trial court's finding that Meraz's plea bargain did not go so far as to prevent the present indictment.⁴

Appellant Sahs attempts to ride the coattails of the evidence presented by Silva and Meraz. Although his allegations raise substantial questions, he presented no testimony of any oral agreement between himself and Mr. Bock. Sahs's lawyer did not examine Bock on the witness stand, nor did either he or Sahs take the stand. The only evidence in the record is the written plea agreement and Sahs's denial at his Rule 11 hearing that there were any promises other than those in the written plea bargain. We must, therefore, uphold the trial court's findings as to Sahs.

II. Immunity

A. *Jan Grossman's Claim*

Grossman asserts that the government granted him informal use immunity in connection with his statements during the Western District's investigation of this drug conspiracy. United States Attorney Bock received authorization from the Justice Department in Washington to grant Grossman statutory use immunity,⁵ but a court order never issued.

4. To be sure, the fact that the original Southern District indictment was returned omitting Meraz as a defendant does offer support to Meraz's version of the promise. We must apply, however, the clearly erroneous standard to the trial court's findings.

5. 18 U.S.C. § 6002 permits the government to grant use immunity whenever a witness refuses to testify before, among others, "an agency of the United States." A person receiving statutory use immunity may not then refuse to testify

on the basis of his privilege against self-incrimination;
but no testimony or other information compelled

Grossman cooperated with Bock's investigation by talking with the DEA on nine different occasions. Southern District United States Attorney Longoria's investigation, however, indicated that Grossman did not cooperate fully. Grossman then submitted to two lie detector tests: the first was inconclusive; the second revealed no deception on the relevant questions. Bock and Longoria, however, remained convinced that Grossman was holding back. Longoria took his evidence to the grand jury, which indicted Grossman.

Grossman then moved to dismiss the Houston indictment on the ground of impermissible use of immunized statements. After a hearing⁶ and an *in camera* inspection of portions of the grand jury transcripts, the trial judge ruled:

Defendant Grossman contends that the Government breached an agreement that he would not be prosecuted for any offense in which he provided information to the Government. The facts alleged by Grossman, when closely scrutinized, do not support this allegation. Assuming *arguendo* that Grossman was granted some informal use immunity, the Government's indictment is proper under

5. (Continued)

under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

6. The first Houston indictment was dismissed after the hearing on Grossman's motion, but before Judge McDonald's ruling on the motion. The parties agreed to use the transcripts of that hearing for purposes of Grossman's motion in the present trial.

Kastigar v. United States, 406 U.S. 441 (1972). The evidence presented to the Grand Jury concerning this Defendant was derived from a legitimate source, independent of the statements made by Grossman to federal agents.

Record, vol. 9 at 2056. We disagree with the trial court's finding that the facts do not support Grossman's allegations. We hold that the government's actions were sufficient to grant use immunity to Grossman.

The record belies the government's argument on appeal that Grossman was protected by an agreement only contractual in nature. The United States Attorney for the Western District moved that Grossman be ordered to testify pursuant to the immunity statutes, and the Department of Justice approved such a grant of statutory use immunity. Record, vol. 13 at 3154. When Grossman consented to the polygraph examination he emphasized the immunity agreement.⁷ Most important, the government recognized the existence of the immunity agreement in its answers to Grossman's motions in the first Houston indictment, characterizing the agreement as "an informal grant of use immunity pending a formal grant of statutory use immunity." 2nd Supp. Record at 8-9. The government even admitted that the government's informal grant of use immunity had the same effect as the grant of

7. The last sentence of the consent agreement read:

However, it is understood that all statements are given pursuant to the immunity agreement between the United States Government and Jan Grossman.

Record, vol. 13 at 3155.

statutory use immunity.”⁸ *Id.* at 9. We have yet to rule on this particular fact situation. In a case with similar immunity facts, in which the defendant refused to testify because he believed that the immunity authorization without the court order was insufficient, however, we held that the refusal was a valid exercise of the defendant’s fifth amendment rights. *United States v. D’Apice*, 664 F.2d 75 (5th Cir. 1981). We reserved the question, however, whether informal use immunity could be enforced:

Our decision does not foreclose the possibility that, in a different case, a prosecutor’s non-statutory immunity commitment may be held enforceable, . . . nor does it preclude a finding that an informal grant of use immunity by a prosecutor in one district is binding in another district or even on the entire government.

Id. at 78 N.6 (citations omitted). Other circuits have recognized the type of informal immunity at issue here. See *United States v. Society of Independent Gasoline Marketers*, 624 F.2d 461, 469-74 (4th Cir. 1979), *cert. denied sub nom Amerada Hess Corporation v. United States*, 449 U.S. 1078 (1981); *United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976); *United States v. Kurzer*, 534 F.2d 511, 513 n.3 (2nd Cir. 1976).

8. The government cited two cases in support of its statement of the law: *United States v. Sanderson*, 498 F.Supp. 273 (M.D. Fla. 1980) and *United States v. Pellon*, 475 F. Supp. 467, 479 (S.D. N.Y. 1979), *aff’d*, 620 F.2d 286 (2nd Cir.), *cert. denied*, 446 U.S. 983 (1980).

The only statutory requirement lacking in this instance was a court order; otherwise both parties agreed that Grossman cooperated pursuant to a use immunity agreement. On these facts we hold that the informal use immunity bestowed upon Grossman shields him to the same extent as would a court order had it issued. *See United States v. Weiss*, 599 F.2d 730, 735 n.9 (5th Cir. 1979).

The government asserts that Grossman breached the immunity agreement and therefore that it can prosecute him for such a breach. We need not rule on whether Grossman failed to cooperate fully because the government's ordinary remedy in that situation is a prosecution for false statement, not an abrogation of the immunity agreement and use of Grossman's statements to prosecute him for other offenses. *See Kurzer*, 534 F.2d at 518. Because Grossman cooperated with the DEA under the grant of use immunity, and was later indicted on charges related to the investigation, the government must then prove that the evidence it used before the Grand Jury was "derived from a legitimate source wholly independent of the compelled testimony." *Kastigar v. United States*, 406 U.S. 441, 460 92 S.Ct. 1653, 1665, 32 L.Ed.2d 212, 226 (1972). Although *Kastigar* described the burden as "heavy", *id.* at 461, 92 S.Ct. at 1665, 32 L.Ed.2d at 227, in fact the government has only to demonstrate by a preponderance of the evidence an independent source for all evidence introduced. *United States v. Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974). We have reviewed the grand jury record submitted for Judge DeAnda's *in camera* inspection. We find that the evidence presented, such as it was, came wholly from other sources. *See United States v. Sockwell*, 699 F.2d 213, 217-18 (5th Cir.), *cert. denied*, 461 U.S. 936 (1983). The government, in this case, met its *Kastigar* burden.

B. Drake Williams' Claim

Appellant Drake Williams contends that Jan Grossman's earlier statements to the DEA should have been admitted as exculpatory evidence. As regards Grossman's statements, he makes three arguments. First, he asserts that the government had a duty to present Grossman's statements to the grand jury. We have just held that presentation of those statements to the grand jury would have violated Grossman's immunity agreement. In addition, we long ago determined that a complaint that "the failure of the government to present evidence to the grand jury which the defendants thought would have been exculpatory" was "wholly without merit." *United States v. Thomas*, 567 F.2d 638, 642 (5th Cir.), *cert. denied sub nom Olivetti v. United States*, 439 U.S. 822 (1978); *see also United States v. Brown*, 574 F.2d 1274, 1276 (5th Cir.) ("the Government is under no duty to present to a grand jury evidence bearing on the credibility of witnesses"), *cert. denied*, 439 U.S. 1046 (1978).

Second, Drake Williams contends that the district court should have compelled the government to immunize Grossman. This contention is entirely without merit. *United States v. Whittington*, 783 F.2d 1210, 1219-20 (5th Cir.) ("[I]n the absence of governmental abuse the Court may not direct the government to grant use immunity to a defense witness who invokes the fifth amendment. . . ."), *cert. denied*, 107 S.Ct. 269 (1986).

Third, Drake asserts that the trial judge improperly excluded Grossman's DEA statements as hearsay for two reasons: (1) because the government prevented Grossman from testifying by its refusal to honor the immunity agreement; and (2) that the testimony was admissible under Fed. R. Evid. 804(b)(5) (circumstantial guarantees of trustworthiness) and Rule 804(b)(3) (statement against interest).

The first assertion falls with Grossman's immunity arguments. The second fails because Grossman did not rely on those evidentiary rules in the district court and therefore did not preserve error. *United States v. Jackson*, 700 F.2d 181, 190 (5th Cir.) ("[A]bsent a showing of manifest injustice, a litigant may not raise a theory on appeal that was not presented to the district court."), *cert. denied sub nom Hicks v. United States*, 464 U.S. 842 (1983). Even had the appellant relied on those evidentiary rules at trial, we find that Grossman's statements would not necessarily have been admissible under either rule. Rule 804(b)(5) is "to be used only rarely, in truly exceptional circumstances." *United States v. Thevis*, 665 F.2d 616, 629 (5th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 825 (1982). Drake Williams has not shown that these circumstances are truly exceptional. Rule 804(b)(3) applies only to statements against interest. Grossman made the statements to the DEA under the protection of immunity and therefore they were not statements against his interest. *United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977).

III. Forum Shopping

Appellants Drake Williams and Meraz contend that the government engaged in forum shopping by dismissing the first indictment in Judge McDonald's court and filing a second indictment five months later. At the defendants' request, Judge McDonald immediately conducted a hearing to ascertain whether the prosecutor acted in bad faith by dismissing the indictment. She found no such bad faith and dismissed the indictment. The second indictment was randomly assigned to Judge DeAnda. He again heard arguments of illicit forum shopping, but denied motions to return the case to Judge McDonald. The appellants contend that the government should have filed a superseding indictment in Judge McDonald's court. Federal Rule of Criminal Procedure

48(a) provides for prosecutorial discretion in dismissing an indictment. "Unless the court finds the prosecutor is clearly motivated by considerations other than his assessment of the public interest, it must grant the motion to dismiss." *United States v. Hamm*, 659 F.2d 624, 630 (5th Cir. 1981) (en banc). No evidence indicates that the district court abused its discretion.

IV. Joinder and Severance

Many of the appellants argue that they deserved separate trials. We first emphasize the general rule that persons who are indicted together should be tried together. *United States v. Harrelson*, 754 F.2d 1153, 1174 (5th Cir.), cert. denied, 106 S.Ct. 599 (1985). The appellants' arguments assert both prejudicial joinder under Fed.R.Crim.P. 14 and misjoinder under Fed.R.Crim.P. 8. We note the conceptual difference between the two rules. See *United States v. Manzella*, 782 F.2d 533, 539-40 (5th Cir.), cert. denied sub nom *Jimenez v. United States*, 106 S.Ct. 1991 (1986). We address each of the appellants' arguments separately under these two rules.

A. Under Federal Rule of Criminal Procedure 14

Appellants Drake and Vance Williams, Grossman, and Watson contend that the district court erred in denying their motions for severance. The Federal Rules of Criminal Procedure give the district court discretion to order a severance "[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants. . . ." Fed.R.Crim.P. 14. Denials of Rule 14 motions are reviewable only for abuse of discretion. *Manzella*, 782 F.2d at 540. We can reverse only if the appellant can demonstrate compelling prejudice against which the trial court was unable to afford protection. *Harrelson*, 754 F.2d at 1174.

1. Need for Testimony

In another attempt to make available Jan Grossman's testimony, Drake Williams asked the district court to sever the two cases. The court refused. To be entitled to a severance, Drake must show (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will in fact testify. *United States v. Butler*, 611 F.2d 1066, 1071 (5th Cir.), *cert. denied sub nom Fazio v. United States*, 449 U.S. 830 (1980). Drake's motion for severance, however, contained only conclusory statements as to the exculpatory nature of Grossman's testimony as well as mere assertions that Grossman would indeed testify. Record, vol. 11 at 1724-27. In addition, the motion was supported by Drake's counsel's affidavit, not an affidavit by Grossman. *Id.* at 2728-29. In this instance, the trial judge did not abuse his discretion to deny the motion. See *United States v. DeSimone*, 660 F.2d 532, 539-40 (5th Cir. 1981), *cert. denied sub nom Butler v. United States*, 455 U.S. 1027 (1982).

2. Evidence Against Other Defendants

Drake and Vance Williams are twin brothers. Three witnesses at trial testified that they sometimes found it difficult to distinguish between the two. The Williamses now argue the confusion of identities required the district judge to sever their trials. Relief from this type of prejudicial joinder becomes necessary only when a jury could not be expected to compartmentalize the evidence as it relates to separate defendants. *United States v. Lemm*, 680 F.2d 1193, 1205 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983). The two brothers, however, played entirely different roles in the criminal conspiracy: Drake organized the financial aspects of the activities, while Vance participated in the actual distribution. The trial court instructed the jury to consider the evidence against each defendant separately. The jury could

easily separate the evidence against the two. Drake and Vance failed to demonstrate that they suffered compelling prejudice, therefore the district court did not abuse its discretion in denying severance on this point. *See United States v. DeVeau*, 734 F.2d 1023, 1027 (5th Cir. 1984), *cert. denied sub nom Drobny v. United States*, 469 U.S. 1158 (1985).

Drake also argues that Vance's prior conviction for narcotics possession increased the prejudice of joinder and therefore mandated severance. We have already held, however, that one brother's conviction does not demonstrate compelling prejudice requiring reversal of a district court's denial of a motion to sever. *United States v. Hogan*, 763 F.2d 697, 705 (5th Cir. 1985). Vance's similar argument that the greater amount of evidence against Drake demonstrates compelling prejudice fails as well. The additional evidence adduced at joint trials does not constitute compelling prejudice by itself. *United States v. Sudderth*, 681 F.2d 990, 996 (5th Cir. 1982). Nor is compelling prejudice assumed because the joint trial was long, the evidence extensive, or the defendants numerous. *United States v. Martino*, 648 F.2d 367, 385-86 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982).

Appellant Sahs also argues that the disparity of proof against himself and Drake required severance. The district court gave appropriate limiting instructions to the jury as the trial progressed and in its charge. In addition, the jury returned a split verdict, acquitting defendant Lunday of all counts and defendant Watson of one count. A split verdict indicates that the jury fulfilled its duty to sift through the evidence. *United States v. Caballero*, 712 F.2d 126, 132 (5th Cir. 1983). Although the evidence at this trial was both massive and complex, with proper instructions the jury could separate and apply the evidence. *See Manzella*, 782 F.2d at 540-41; *United States v. Merida*, 765 F.2d 1205, 1219 (5th Cir. 1985).

3. *Evidence of Continuing Criminal Conduct*

At the trial, Julia Reinhart testified that defendants Vance Williams and Oscar Silva were dealing drugs with her husband during the trial. Several appellants contend that the evidence of continuing crime by some of the defendants created spill over prejudice that affected the jury's deliberations. The limited testimony did not implicate any of the other defendants. The trial judge specifically instructed the jury not to use Ms. Reinhart's testimony as evidence against only Vance Williams and Silva. Record, vol. 28 at 96. We cannot say that the appellants were unable to receive a fair trial because of the testimony. Under the standard of review for Rule 14 severances, we find that the trial court did not abuse its discretion by denying them.

4. *Joint Representation of Drake and Vance Williams.*

Drake and Vance Williams moved for severances based on actual conflict of interest that occurred because both were represented by the same counsel at trial. They contend that the joint representation violated their fifth and sixth amendment rights to conflict-free counsel. Both Vance and Drake waived their right to separate counsel after a hearing in conformity with the mandates of *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), and Fed.R.Crim.P. 44(c). The trial judge specifically admonished the brothers of the potential for future conflict. The brothers knowingly waived their right, intelligently and voluntarily. The law requires nothing more for a valid waiver. They cannot now argue for a reversal on this ground. *United States v. Howton*, 688 F.2d 272, 276 (5th Cir. 1982).

B. Under Federal Rule Criminal Procedure 8(b)

Appellant Sahs contends that joinder of defendants involved solely in drug activities with defendants involved in the income concealment scheme violated Fed.R.Crim.P. 8(b).⁹ Questions of misjoinder under Rule 8(b) are reviewable on appeal as a matter of law. *United States v. Marionneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975). The indictment charged Sahs in only counts 1 and 2: RICO conspiracy and substantive RICO violations. He was not charged with any of the income concealment activities. Those two charges encompassed eight of the original ten defendants. There is no question that joinder of these defendants was proper under Rule 8(b). The income tax concealment counts were properly tried with the RICO counts as part of a series of acts or transactions. See *United States v. Welch*, 656 F.2d 1039, 1051 (5th Cir. 1981), *cert. denied sub nom Cashell v. United States*, 456 U.S. 915 (1982).

V. Limitation of Cross-Examination

Appellants Silva, Vance Williams, and Meraz contend that the district court's limitation of cross-examination of the government's star witness, Tim Cassias, deprived them of their sixth amendment confrontation right. The trial judge cut off Silva's attempt to impeach Cassias by questions about a previous trial in which Cassias had admittedly committed perjury. The matter had been brought out in open court,

9. Fed.R.Crim.P. 8(b) provides in part:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

however, during earlier cross-examination of Cassias. Restrictions on the scope of cross-examination are within the sound discretion of the trial judge. *United States v. Summers*, 598 F.2d 450, 460 (5th Cir. 1979). In the present case, the jury heard evidence of Cassias's previous perjury; they were exposed to facts from which they could draw inferences as to the unreliability of the witness. Furthermore, the cross-examination of Cassias adequately enabled defense counsel to argue why the jury should disbelieve him. The district court's subsequent limitation of cross-examination did not violate the defendant's sixth amendment rights. See *Summers*, 598 F.2d at 460-61; *United States v. Elliott*, 571 F.2d 880, 908 (5th Cir.), *cert. denied sub nom Delph v. United States*, 439 U.S. 953 (1978).

VI. Judicial Misconduct

The appellants contend that the district judge's conduct and comments during the trial deprive them of their constitutional rights to a fair trial, due process, and the effective representation of counsel. We view these assertions seriously: a trial judge has enormous influence on the jury and therefore must act with a corresponding responsibility. The conduct and comments complained of consist generally of frequent interruptions of and belittling comments regarding defense counsel, limitation of cross-examination, and judicial questioning of the witnesses. In reviewing these claims, we are necessarily limited to the cold black and white of the transcripts. The life of the trial, in which gestures and intonations breathe more subtle meanings into the transcribed words, cannot be presented and escapes us. We must therefore scrutinize the record all the more carefully. The Second Circuit has described the task before us:

Our role, however, is not to determine whether the trial judge's conduct left something to be

desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the appellants] a fair, as opposed to a perfect, trial.

United States v. Pisani, 773 F.2d 397, 402 (2nd Cir. 1985).

During this eight-week trial of the original ten defendants, the appellants claim that the district judge interrupted defense counsel over 900 times,¹⁰ while interrupting the government significantly less. A statistical count of court interruptions is pertinent to the inquiry. *United States v. Sheldon*, 544 F.2d 213, 216 (5th Cir. 1976). More pertinent in this case, however, is the nature of the interruptions. The trial involved a 26-count indictment of 10 defendants, with 176 government witnesses, that took place over eight weeks. The RICO conspiracy involved complex issues. For such a trial to proceed smoothly, it was necessary for the trial judge to exercise tight control over the presentation of evidence to the jury. Such control is within the broad role of the trial judge as described in *Moore v. United States*, 598 F.2d 439 (5th Cir. 1979):

“[t]he trial judge has a duty to conduct the trial carefully, patiently, and impartially.

10. Not all interruptions were derogatory or harmed the appellants' presentation of their cases. Many were, in fact, helpful. During the cross-examination of one irascible witness, Judge DeAnda took over the questioning and elicited the answers that the witness had refused to give the defense counsel. Record, vol. 22 at 56-59.

He must be above even the appearance of being partial to the prosecution." On the other hand, a federal judge is not a mere moderator of the proceedings. He is a common law judge having that authority historically exercised by judges in the common law process. He may comment on the evidence, may question witnesses and elicit facts not yet adduced or clarify those previously presented, and may maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretion. Only when the judge's conduct strays from neutrality is the defendant thereby denied a constitutionally fair trial.

Id. at 442 (citations omitted) (quoting *Herman v. United States*, 289 F.2d 362, 365 (5th Cir.), *cert. denied*, 368 U.S. 897 (1961)); *see also United States v. Adkins*, 741 F.2d 744, 747-48 (5th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985) (quoting *Moore*).

The trial judge exercised tight control over this trial. He did not allow repetitious questioning by either the defense or prosecution. Before limiting cross-examination, however, he would usually warn the attorney that the line of questioning was repetitious and frequently he would ask what new facts or impeachment the attorney wished to elicit. He did not allow counsel for either side to argue with the witnesses, nor with any of his rulings as to court procedure. Sometimes his manner was abrupt,¹¹ yet he always allowed the attorney

11. At the beginning of the trial, after an argumentative question by one of the defense counsel, Judge DeAnda said, "Let me tell you right now, Mr. DeGuerin, you haven't tried a case before me, I don't believe, but I do not tolerate that at all. You're going to conduct the cross-examination in the proper manner or we're going to have some problems." 1st Supp. Record, vol. 4 at 175.

to perfect the record when he ruled against him. At times he treated the prosecutor in the same manner.¹²

Most of the conduct complained of by the appellants falls squarely within a federal judge's "wide discretion with respect to the tone and tempo of proceedings before them. . . ." *Adkins*, 741 F.2d at 747. The judge's questions of the witnesses showed no bias or prejudice, but "sought only to clarify a witness's testimony either for the court, for the jury, or for counsel." *United States v. Borchardt*, 698 F.2d 697, 700 (5th Cir. 1983). In limiting cross-examination, the trial judge acted within "his discretion to interrupt and cutoff counsel's questioning in order to expedite the proceedings and did not make the judge an advocate for the prosecution." *Id.* The trial court permitted the defense counsel to cross-examine each witness fully. The limitations imposed avoided repetition and excluded irrelevant testimony. These limitations did not deprive counsel of their right to cross-examine witnesses

12. Some of the judge's comments to the prosecutor showed the same brusque manner of which the appellants complain. At one point, after the trial court admitted a defense exhibit, the prosecutor belatedly said that he had no objection. Judge DeAnda quickly responded, "I'm glad you didn't because I already admitted it." Record vol. 40 at 303. Another time, after an early objection by the prosecutor, the trial court commented:

THE COURT: The only trouble with your objections, they come before he asks the question.

MR. MAGISDSON [prosecutor]: I object to the first part.

THE COURT: I admire you for your ability for being able to tell what's going to happen. I don't have same ability. Wait until he finishes the question, then make the objection.

1st Supp. Record, Vol. 4 at 242.

effectively, nor did they imply that the judge favored the prosecution's evidence.

Most important to our conclusion that the trial judge maintained the neutrality required of him are the clear and repeated instructions by him to the jury that it was not to consider any questioning or comment by him in its deliberations. In his final instructions, the judge strongly admonished the jury not to consider any of his comments or questions as evidence and specifically not to construe his actions as trial judge as favoring either the government or the defense.¹³

13. The court instructed the jury as follows:

During the course of this trial, jurors, I had occasion to rule on objections. I've had occasions sometimes to admonish the lawyers. In one instance I even fined Mr. Bennett. The fact I did these things should in no way be construed by you as any feeling I might have in the case one way or the other. I rule on the objections of the lawyers the way I think the law requires me to rule. Sometimes I rule in favor of the Government, sometimes in favor of the Defense, sometimes in favor of neither, from the reaction I get, but I don't do that with the idea and I do not want to leave the impression, that I wish one side would prevail over the other because I certainly did not do that. If I did you have every right to resent it because I'm not on the jury. You see, jurors, you can't tell me what the law is. I tell you that and you have to accept it. I can't tell you what the facts are because that's your job and that's the way our system works. It works very well. So—also during the course of the trial I've had occasion perhaps to ask witnesses questions because I may not have heard something a witness said or I could not understand clearly what the import of the witness's testimony was and I want to clarify so I might be able to give you a charge, based on the evidence, but when I ask a witness a

These instructions are an important consideration in determining whether the defendants received a fair trial. See *United States v. Carpenter*, 776 F.2d 1291, 1295-96 (5th Cir. 1985); *Adkins*, 741 F.2d at 748; *Borchardt*, 698 F.2d at 700; *United States v. Middlebrooks*, 618 F.2d 273, 277 (5th Cir.), cert. denied, 449 U.S. 984 (1980).

Some comments, however, may be so prejudicial that even good instructions will not cure the error. *Bursten v. United States*, 395 F.2d 976, 983 (5th Cir. 1968). Some of the comments of the court, made more than once in the presence of the jury, approach the line closely. Some comments made

13. (Continued)

question, I believe I mentioned this earlier, it's not because I believe what the witness is going to answer or because I disbelieve what the witness is going to answer. When I ask a witness a question, jurors, I simply do it with this purpose in mind, and that is you hear the answer to my question then you decide whether that answer is truthful or not or accurate or not and whether it helps you or not. That is my sole reason that I have for asking witnesses questions. So, do not assume from anything I have said or any action on my part that I have any opinion in this case, because I do not. That's for you to decide. I will have an opinion in this case when you return a verdict and I will assure you that my opinion will coincide with yours, it always does because I think twelve persons sitting in the privacy of a jury room and discussing the evidence and reviewing it come out with the right answer, time and again. They overlook nothing, forget nothing and are fooled by no one.

by him in controlling the questioning were sharp indeed¹⁴ and some criticisms of counsel unnecessarily harsh.¹⁵ In

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14. Q. [by MR. DeGUERIN] Is that what qualified to become a confidential informant?

THE COURT: That's argumentative, counsel, please why don't we start asking something about this case now.

MR. DeGUERIN: It's about his credibility as a witness.

THE COURT: I haven't heard anything from you yet, Mr. DeGuerin. Get off that and go to something else.

1st Supp. Record, vol. 4 at 189-09.

MR. COLLINS: May I pursue this?

THE COURT: I wish somebody would catch something instead of so much pursuit. Go ahead.

Id. at 221.

15. Q. [By MR. R.S. BENNETT] Mrs. Cassias, you agree with me, you would agree with me it was only after you had lunch with the Government that you came back and identified Mr. Orellana, isn't that correct?

THE COURT: I think it's an absurd question, counsel.

Don't answer it.

Q. The Government told you to come back in to the courtroom after lunch and identify Mr. Orellana, isn't that correct?

determining whether the trial judge overstepped the bounds

15. (Continued)

A. No, sir, that's not correct.

Q. They talked to you about the fact that you left out Mr. Orellana, isn't that right?

A. No, sir, they did not.

Q. Your brought up the fact you needed to name some other people and you came back and named Mr. Orellana, isn't that correct?

MR. MAGIDSON: I object.

THE COURT: Sustain the objection. He was answering the question asked him when he identified Mr. Orellana, counsel. I think the jury is aware of all that. That is an unwarranted attack of the Government and the jury is not to consider it. Sometimes the tactics of lawyers is to throw a smoke screen from the facts and inject in the case questions for which there's absolutely no basis.

MR. DeGUERIN: I object.

THE COURT: Let me finish and you can object. Be seated.

That happens sometimes during cases, jurors, and that's why I told you earlier that the question of a lawyer is never evidence in the case. It's the answer the witness gives.

Now you may indicate your objection.

of acceptable judicial conduct, we must view the proceedings

15. (Continued)

THE COURT: Don't argue with the witness.
Just ask questions.

MR. R.S. BENNETT: I apologize.

THE COURT: I wish you'd stop apologizing so much and don't do something you have to apologize for.

MR. R.S. BENNETT: I'm trying to represent my client.

THE COURT: You can represent your client under the rules, I don't think that's asking too much.

1st Supp. Record, vol. 7 at 172.

MR. R.C. BENNETT: Excuse me, Your Honor, I respectfully object to the Court now taking the cross-examination and ask the Court not to continue so that I may afford effective assistance of counsel and continue to examine him on that.

Q. You wouldn't hire Jude Peterson to do your books today?

MR. MAGIDSON: Your Honor, I think we're outside the parameters —

THE COURT: I doubt he would hire Drake Williams to do anything today, counsel.

MR. R.S. BENNETT: Excuse me, Your Honor. The question was Jude Peterson.

THE COURT: Oh, Peterson to do his books today?

as a whole. *Carpenter*, 776 F.2d at 1294. Although we regret these comments, after careful examination of the trial record, we cannot say that the incidents complained of deprived the appellants of a fair trial. Overall, the judge conducted this complex trial in an impartial manner.

Three particular incidents during the trial are most troubling. The first occurred during the Rosenblath recross-examination by Mr. R.S. Bennett:

THE COURT: Oh, you're going to hear more comments than that before it's all over. I'm going to comment on this evidence in my charge. I just didn't understand. I thought you said Drake Williams. I misunderstood him.

Record, vol. 18 at 173-74. The judge's interjection, although admittedly occasioned by a misunderstanding, reflects badly

15. (Continued)

* * *

MR. R.C. BENNETT: If it please the Court, I interpose an objection to the Court's comment about not hiring Drake Williams.

THE COURT: I'm sorry. I misunderstood.

MR. R.C. BENNETT: Because of the comment by the Court, we move for a mistrial.

THE COURT: You can when I finish. I'll overrule your objection. You tried, I gave you a chance and you weren't doing too well.

Id. at 110-11.

on Drake Williams and could be interpreted as the judge's opinion as to Drake Williams's guilt. We conclude, however, that the judge's immediate acknowledgment of his mistake, his later admonishment to the jury to disregard his comments, and the isolated nature of this one sufficiently guarded against prejudicial use of his statement by the jury.

The second incident occurred when Judge DeAnda fined Mr. R.S. Bennett \$250 for contempt, *in front of the jury*.¹⁶ A trial judge should not fine a lawyer for contempt before the jury. The risk of prejudice is great with such a strong showing of displeasure. Yet there is no *per se* rule requiring reversal for such an act. Furthermore, the judge later explained his gruff manners to the jury in a way that minimized the

16. The contempt fine occurred during the following exchange:

MR. MAGIDSON: I object. He's already answered that.

MR. R.S. BENNETT: Your Honor, he said —

THE COURT: Sustain the objection.

MR. R.S. BENNETT: But Your Honor —

THE COURT: Sustain the objection. Just have a seat and ask your next question. Do not argue with me again during this trial.

MR. R.S. BENNETT: I apologize.

THE COURT: Don't apologize, don't argue anymore. And that's going to cost you two hundred and fifty dollars for disobeying my orders. I told you to quit arguing with me.

1st Supp. Record, vol. 7 at 155.

potential for misunderstanding by the jury.¹⁷ Once again,

17. At the end of trial on a Friday afternoon, Judge DeAnda made the following speech to the jury:

I started to say tomorrow.

I had my heart set on working tomorrow. We'll —
Mr. DeGuerin, I smiled again, but —

MR. DeGuerin: I was smiling at that, too. I want to work tomorrow.

THE COURT: Well, see, Mr. DeGuerin chides me occasionally because I smile or some mannerism.

And jurors, let me say if I have, during the course of this trial, smiled many times, you know, it's just in my nature to smile, and sometimes I frown and —

MR. DeGUERIN: Only at me, Your Honor.

THE COURT: Well, I think others share equal billing with you, Mr. DeGuerin.

When I do that, I don't take it to intend any impression, leave any impression with you about how I feel about a witness' testimony or a witness's credibility, or the witness' case or the witness' side.

I think I smile during both sides, but that's not my purpose.

And so, don't — I do not, in any way, want to infringe upon your duties and your responsibilities; so, please, do not take any mannerism of mine — I've even been criticized for throwing a pencil down once and I throw pencils down about half a dozen times a day, but don't take that as any impression that I'm for or against anybody.

we fail to find any actual prejudice resulting from this unfortunate lapse.

In the final incident, the trial judge voiced an aside during the cross-examination of a government DEA agent. Defense counsel had elicited an admission that to work as an informant for the DEA one had to be adept at telling lies.¹⁸ During the questioning the following took place:

Q. [by Mr. R.S. Bennett]: [The informant] assumes the role and enters into deception and tells lies, isn't that correct?

A. [by Mr. Sims D. Bowers] Okay.

THE COURT: Little white lies.

THE WITNESS: Little white lies.

1st Supp. Record, vol. 9 at 172-73. The Record reflects that

17. (Continued)

Sometimes I get angry with lawyers, but never with clients, never in my whole life have I ever gotten angry with a client, with a party or with a juror.

I save my anger for the lawyers, just as they do for me sometimes.

So, do not take that as any reflection on anyone here, all right?

Record, vol. 44 at 260-61.

18. This would aid in the impeachment of Tim Cassias, the government's star witness and an informer for the DEA.

the jury laughed out loud at the judges's remark. Record, vol. 19 at 64. The judge explained his comment to counsel the next day outside the presence of the jury as merely cutting off a repetitious line of questioning over a matter not in dispute. *Id.* The court should not have made such a belittling comment; the proper method to curtail the questioning would have been a direct instruction to the attorney. His "[l]ittle, white lies" comment could be construed by the jury as an expression of the judge's personal opinion. For the same reasons mentioned above, however, we fail to find prejudice from this isolated remark.

The court undeniably trod the line of error in various comments during the eight-week trial. We emphasize, however, that it *was* an eight week one. We conclude that these relatively infrequent incidents, regrettable though they may be, did not deprive the defendants of their rights to a fair trial and effective assistance of counsel. The appellants have not proved that the errors were substantial and that they prejudiced their clients' cases. *Carpenter*, 776 F.2d at 1294. This case has much in common with the Second Circuit case of *United States v. Pisani*, 773 F.2d 397 (2nd Cir. 1985). We agree with their holding involving similar incidents:

Moreover, as serious as some of the incidents are, they occupy but a very small part of this extensive trial record. Most importantly, Judge Edelstein at least partially mitigated the possibly prejudicial impact of his comments by explaining to the jury several times that his admonishments of counsel should have no bearing on their deliberations or determinations. . . . Viewing the record as a whole, therefore, we conclude that while some of the trial judge's comments and behavior toward defense counsel were regret-

table, they did not convey to the jury an impression of partiality toward the government to such an extent that it became a factor in their deliberations.

Id. at 404.

VII. Midtrial Publicity

A month into trial, the government placed Julia Reinhart on the witness stand. Her testimony indicated that defendants Vance Williams and Silva were involved in drug deals even during the trial. The trial judge admitted the evidence over defense objections. Vance Williams and Silva argue that evidence of other crimes was inadmissible under Federal Rules of Evidence 404(b) (evidence of other crimes) or 403 (probative value substantially outweighs the danger of unfair prejudice). To review this argument, “[f]irst it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant’s character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403.” *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979). The government alleged that Vance Williams and Silva worked together closely in distributing marijuana and that this conspiracy continued until at least the date of the indictment. Reinhart’s testimony that Vance and Silva were still engaged in such conduct is relevant to the conspiracy issue. The testimony was neither irrelevant nor too remote. “Whatever prejudice there was arose from this firm relevance.” *United States v. Mortazavi*, 702 F.2d 526, 528 (5th Cir. 1983).

Reinhart’s testimony affected defendants Vance Williams and Silva severely. The trial judge revoked their bail and the

two were returned to the custody of the United States Marshal. The media covered the indictment extensively: front-page headlines with a color photograph of the two being led away in handcuffs and chained together from the courthouse in one of Houston's daily newspapers,¹⁹ an article of page 27 of the other daily,²⁰ as well as reports on the local television and radio news programs. Silva immediately requested the judge to individually voir dire the jurors to see if the adverse publicity had affected any of them. The judge denied the request.

We recently discussed the issue of midtrial publicity in *United States v. Manzella*, 782 F.2d 533, 541-44 (5th Cir.), cert. denied sub nom *Jimenez v. United States*, 106 S.Ct. 1991 (1986). A court should conduct a voir dire if "serious questions of possible prejudice" arise. To determine if those questions exist,

A court must first look at the nature of the news material in question to determine whether it is innately prejudicial; factors such as the timing of the media coverage and its possible effects on legal defenses are to be

19. The *Houston Post* carried the color photograph with the caption: "Silva, left, and Williams leave Federal Building in chains." The article beneath the photograph was titled: "*Rockets Trial 'Bombshell': Drug deals continue: witness.*" The article began on page one and continued on page three. It summarized Julia Reinhart's testimony before the judge outside the presence of the jury. The following day the *Post* ran an article on page 16A in which it quoted the trial judge saying "I'm outraged by his conduct."

20. On page 27 of its first section, the *Houston Chronicle* ran an article titled: "Judge jails 2 suspects in narcotics trial after hearing testimony." It detailed the judge's decision to revoke bail as well as briefly summarizing Reinhart's testimony.

considered. Second, the court must ascertain the likelihood that the publicity has in fact reached the jury. The prominence of the media coverage and the nature and number of warnings against viewing the coverage become relevant at this stage of the inquiry.

Id. at 542 (citing *United States v. Herring*, 568 F.2d 1099, 1105 (5th Cir. 1978)). *Herring* provides an example of publicity that crossed the first line of inquiry. In *Herring*, the papers published accounts of threats on the main prosecution witness's life immediately after that witness had testified. This also occurred on the day the defense presented its side of the story. The entire trial lasted only three days and the jury deliberated on the day that the damaging articles appeared. In describing the factors involved in the first step of the analysis, we said: "The critical question here is whether that material 'goes beyond the record . . . and raises serious questions of possible prejudice' to the litigants." *Herring*, 568 F.2d at 1104 (*quoting* ABA Standards Relating to Fair Trial and Free Press § 3.5(f) (1968)). Although the timing of the publicity was not as harmful in this case, the nature of the material definitely goes beyond the record and raises serious questions of possible prejudice. The act of the judge revoking bail and ordering Vance Williams and Oscar Silva into custody based on Julia Reinhart's testimony places the judge's official imprimatur on the credibility of her testimony. We find that this publicity crosses the initial threshold.

We must ascertain the likelihood that this publicity actually reached the jury. The factors which we must consider point to opposite conclusions. The media coverage was extensive, including front-page color photographs with accompanying headlines visible at any newspaper vending machine. The jury was not sequestered, and the information

was not published in an obscure way. The other factor, however, emphasizes the trial judge's explicit instructions "not to read or listen to any thing pertaining to this case." Record, vol. 24 at 252. He gave similar instructions at the close of each day. On the day preceding the particularly damaging publicity, he emphasized his instruction not to listen to outside publicity.²¹

The facts in this case fall between those in *Herring* and those in *United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985). We found that the trial judge's instructions in *Herring* were inadequate. *Herring*, 568 F.2d at 1101 n.6. The trial court did not instruct the jury *not to examine at all* any external information, but only instructed it to *disregard* that information. *Id.* at 1105. This was pivotal in deciding that the publicity required the judge to voir dire the jury. The *Herring* court reversed because of the trial court's failure to do so.

In *Harrelson*, however, despite the extent of the publicity, we determined that the trial judge's instructions adequately shielded the jury from contamination. Yet there we relied

21. The judge instructed the jury as follows:

. . . I anticipate there will be continued publicity about this case in the media. So, I'm going to ask you one more time and remind you one more time of your commitment not to expose yourself to any extraneous matters, not to listen to anything on the T.V. about the case nor read anything about it in the newspapers. I'm confident you will comply with my instructions which will enable you to reach a verdict in this case based on what you hear in the courtroom.

Record, vol. 23 at 228-29.

upon more extensive instructions and other evidence than that involved in this case. The judge admonished the jury not to read or listen to external news. He also furnished newspapers to the jury from which references to the trial had been stricken. *Harrelson*, 754 F.2d at 1163. In addition, at the start of trial each day the judge asked the jury if it knew or heard of anything about the case other than from the evidence presented at trial. Furthermore, *Harrelson* noted:

Given the degree of indifference of these particular jurors to the media revealed by the voir dire, . . . [the instruction not to read or listen to anything about the trial] was more likely to be effective here than in the ordinary case.

Id. at 1164 n.9.

We cannot say that these extra talismans existed in the present case. Upon careful consideration, we conclude that our case more closely parallels *Herring* than *Harrelson*. Silva squarely moved for a voir dire of the jury members. It was reversible error for the trial court not to inquire of the possible contamination. We held in *Herring* that the district court

should have examined each juror separately, in the presence of counsel, to determine (1) how much contact the jury members had had with the damaging publicity and (2) how much prejudice to the defendant had resulted from that contact, assuming that any had occurred. For the present, we are unwilling to speculate on the extent of whatever prejudice existed; the point, however, is that since the

district court did not question the jury members in order to ascertain the extent of that prejudice, we would have to speculate to conclude that undue prejudice did not exist. In the interest of justice, we must give the defendant the benefit of the doubt in this connection. The state of the record now before us permits no other action.

Herring, 568 F.2d at 1106. The conviction of appellant Oscar Silva must be reversed and his case remanded for further proceedings on these grounds.

Appellant Vance Williams did not contend on appeal for a reversal for prejudicial publicity. Nor did he adopt the arguments of his co-appellants pursuant to Federal Rules of Appellate Procedure Rule 28(i). We therefore cannot reverse as to him on these grounds. Appellants Grossman, Watson, and Meraz argue that the midtrial publicity prejudiced their defenses as well. The substance of the articles, however, could not be taken as probative of their guilt. They cannot cross the first step of the inquiry. *See Manzella*, 782 F.2d at 543-44.

VIII. The RICO Enterprise Instruction.

Six appellants assert that the district court's instruction on the RICO enterprise element was inadequate. The district court's instruction followed the statutory definition of enterprise:

[A]n enterprise . . . is a group of two or more persons associated in fact, that is, they are united, although not a legal entity such as a corporation or company, that is a group of people that are associated together for a

common practice of engaging in a course of conduct.²²

Record, vol. 28 at 99. The appellants timely objected and proffered their own alternative based on the Eighth Circuit's enterprise requirements found in *United States Bledsoe*, 674 F.2d 647 (8th Cir.), *cert. denied sub nom Phillips v. United States*, 459 U.S. 1040 (1982). We had earlier noted the question that this case squarely presents: "Nor do we need to decide whether, as the Court held in [*Bledsoe*], it is essential that an enterprise have an ascertainable structure, operate as a continuing unit, and have a goal common to its members." *United States v. Cauble*, 706 F.2d 1322, 1340 n.60 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). We now decide whether a judge must instruct the jury as to these subelements of a RICO enterprise.

The instruction given by the district court conforms to the dictates of *United States v. Elliott*, 571 F.2d 880, 897-99 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). *Elliott* held that the RICO enterprise included entirely illegal informal associations. *Id.* at 898. The Supreme Court subsequently confirmed *Elliott's* broad view of the enterprise elements by refusing to restrict the enterprise to only a legitimate business organization. *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). The appellants argue, though, that *Turkette's* emphasis of the distinctness of the

22. The statutory definition reads:

"enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . .

18 U.S.C. § 1961(4).

enterprise element requires a more detailed enterprise instruction than the pre-*Turkette* cases indicated. The Eighth Circuit interpreted *Turkette* in this light and demanded that a jury find that an enterprise have an "ascertainable structure," a "common goal as to its members" and operate as a "continuing unit." *Bledsoe*, 674 F.2d at 665. That court also specifically doubted the continued propriety of *Elliott*. *Id.* We must turn to the language of *Turkette* to resolve the question whether *Elliott* instructions can provide the correct guide to a jury. That decision detailed:

That a wholly criminal enterprise comes within the ambit of the statute does not mean that a "pattern of racketeering activity" is an "enterprise." In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering

activity;" it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Turkette, 452 U.S. at 583, 101 S.Ct. at 2528, 69 L.Ed.2d at 254-55 (footnote omitted). This passage emphasizes that the government must prove both an enterprise and a pattern of racketeering. It reiterates the statutory definition of enterprise: "a group of persons associated together for a common purpose of engaging in a course of conduct." The discussion of the type of evidence that will support the finding of an enterprise does not mandate a standard jury instruction breaking down the elements of an enterprise.

The district court complied with both *Elliott* and *Turkette*. More than once, the court instructed the jury that they must find both the existence of the enterprise *and* a pattern of racketeering. See Record, vol. 28 at 99, 111, 113. The judge carefully distinguished these two elements. We hold that his definition of enterprise complied with the standard in this circuit. The court's charge sufficiently distinguished the enterprise and racketeering elements so that the jury could convict only if it had found the existence of both elements.

IX. Sufficiency of the Evidence

Six of the appellants challenge the sufficiency of the evidence on some or all of the counts. "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942). We have closely examined the record in relation to each

appellant's assertion. We discuss below only those instances that the evidence presents close questions. In all other instances we have found evidence sufficient to support the convictions.

The jury found Tanny Miller guilty of conspiring to make and subscribe false tax returns (26 U.S.C. § 7206(1)) (count 8) and assisting the preparation of a false tax return (26 U.S.C. § 7206(2)) (count 19). He now argues that the evidence was insufficient to support the jury finding. We agree. The government's case against Miller revolves around the exchange of \$20,000 cash for a check from a legitimate business for contract labor as part of Drake Williams's laundering scheme.²³ Stephen Rosenblath testified that Drake Williams told him that he had a person "interested in making a cash check swap." 1st Supp. Record, vol. 6 at 213. Rosenblath then sketched-out the contract specifications and gave it to Drake to have him type it up. He also testified that Drake told him the other party was going to be Tanny Miller. A week later, he met with Jude Peterson, received the contract signed by Miller, wrote a \$20,000 check to Tanny Miller, and collected his \$18,000.²⁴ Rosenblath testified that he never discussed the transaction with Miller nor was Miller present at any stage of the deal. Record, vol. 18 at 114. Jude Peterson testified that Miller signed the contract in his presence. 1st Supp. Record, vol. 7 at 44. The government also introduced evidence that Miller negotiated the check and

23. Stephen Rosenblath, an unindicted co-conspirator, owned a successful landscaping business and employed Drake as his accountant. Because of his high taxes Drake suggested that Rosenblath exchange company checks for cash and enter the transaction into his books as a tax-deductible contract labor payment. Rosenblath agreed to the scheme.

24. Drake Williams charged a ten percent fee for these transactions.

that Rosenblath did use the phony contract labor payment in his income tax return.

A person need not actually sign or prepare a false tax return to either conspire to or actually aid and abet the filing of a false income tax return. *United States v. Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978). Yet the government must prove that Miller knowingly made the exchange *with the expectation* that Rosenblath would use it to file a false tax return. *See id.* The government contends that Miller's expectation can be inferred from the above facts. We disagree. A reasonable minded jury would necessarily entertain a reasonable doubt of Miller's guilt upon these facts. There was no testimony to indicate that Miller knew of the tax-fraud scheme. The testimony showed that the main purpose of the scheme was to help launder drug money. Miller had some money to launder and did so. That he did so with the expectation that Rosenblath would then file a false income tax return is to speculate unreasonably on the evidence. We therefore reverse counts 8 and 9 as to appellant Tanny Miller.

Vance Williams challenges the sufficiency of evidence on the RICO investment charge (count 3). This count alleged six overt acts in which Vance participated and from which Vance received income that he then invested in his brother's printing company. The trial judge instructed the jury that the five-year statute of limitations applied to this count in that one of the racketeering acts must have occurred within five years of the date of the indictment.²⁵ The only act that

25. We do not necessarily agree that this is a correct statement of the law. The government argues that if any act of *investment* occurs within five years, then the statute of limitations is met. We need not decide this issue here because the government did not object to the district court's instructions. They cannot now raise this issue on appeal.

occurred within that period charged Vance with possession of marijuana in Anthony, New Mexico, in March of 1980. On appeal, the government does not dispute Vance's challenge of that overt act. Instead they point to evidence of other crimes in which the evidence showed Vance participated. Those acts, however, did not go to the jury and they could not have found him guilty of them. The testimony at trial did not indicate that Vance had either actual or constructive possession of that load of marijuana charged in overt act 15 of count 3. We must, therefore, reverse Vance Williams' conviction under count 3 of the indictment.

Appellant Orellana challenges his convictions on count 1 (RICO conspiracy) and count 2 (substantive RICO). We find the evidence sufficient to uphold Orellana's conviction under count 1.²⁶ Count 2 presents a closer issue. The government was required to prove two racketeering acts by Orellana. They alleged only two: receipt of marijuana delivered by Tim Cassias, and a Travel Act violation — interstate travel by Orellana to facilitate marijuana trafficking in violation of 18 U.S.C. § 1952(a)(3). There is substantial evidence of the former act. As to the latter act, Jude Peterson testified that in the spring of 1980 he picked up Orellana at the Austin airport; they went to Watson's house in Marble Falls; they consumed cocaine and marijuana; and that Orellana said he had come to the area for the purpose of meeting Watson.

26. Because we find the evidence sufficient to show that Orellana agreed to personally commit at least two racketeering acts, we need not reach the question whether conviction under a § 1962(d) conspiracy to violate § 1962(c) requires agreement of the individual to *personally* commit two racketeering acts as opposed to an agreement that the *enterprise* commit two racketeering acts. For an excellent discussion of this question, see *United States v. Neapolitan*, 791 F.2d 489, 494-500 (7th Cir.), *cert. denied*, _____ U.S. _____, 107 S.Ct. 422, 93 L.Ed.2d 372 (1986) (holding that RICO requires only the latter).

1st Supp. Record, vol. 7 at 38-40. Orellana challenges only the proof of interstate travel element of the charge. The government also adduced evidence that Orellana resided for years in New England at least up until April of 1980 and that he had no known Texas residence. Although the direct evidence that he travelled interstate is slim, it and the logical inferences that can be drawn from it are sufficient for a reasonable juror to find that Orellana travelled interstate to promote the distribution of drugs. *See United States v. Loalza-Vasquez*, 735 F.2d 153, 158 (5th Cir. 1984).

The government does not oppose reversal of Drake Williams's convictions on counts 5 and 6 (concealment of material facts) on the basis of insufficient evidence. We therefore reverse as to those counts.

X. Other Issues

Drake Williams contends that the prosecutor engaged in misconduct by eliciting an improper racial slur attributed to Drake from a government witness. "To warrant a new trial prosecutorial misconduct in the form of improper comment or questioning 'must be so pronounced and persistent that it permeates the entire atmosphere of the trial.' " *United States v. Lichenstein*, 610 F.2d 1272, 1281 (5th Cir.) (quoting *United States v. Blevins*, 555 F.2d 1236, 1240 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978)), cert. denied sub nom *Bella v. United States*, 447 U.S. 907 (1980). In this case, it was not the prosecutor, but the trial judge who inadvertently elicited the statement; it was one remark in an eight-week trial; and the court issued a curative instruction. We find no reversible error.

Drake argues that the RICO language of "narcotic or other dangerous drugs" did not give him fair notice of the inclusion of marijuana within the RICO statutory scheme

because it did not define "other dangerous drug." Marijuana is a Schedule I controlled substance and therefore falls within the ambit of RICO. *United States v. Phillips*, 664 F.2d 971, 1039-40 (5th Cir. 1981), *cert. denied sub nom Meinster v. United States*, 457 U.S. 1136 (1982). Because of the federal government's treatment of marijuana, the RICO statute gives a person of ordinary intelligence fair notice that marijuana is included as a dangerous drug. *See United States v. Harriss*, 347 U.S. 612, 617 (1954).

Drake also asserts that his convictions for drug offenses under 21 U.S.C. §§ 846 (conspiracy to distribute cocaine) (count 9) and 848 (continuing criminal enterprise) (count 4) and his RICO conspiracy conviction (count 1) are the same offenses for double jeopardy purposes. We have already held otherwise. *See United States v. Erwin*, 793 F.2d 656, 659 (5th Cir. 1986) (RICO and continuing criminal enterprise violations are separate); *United States v. Smith*, 574 F.2d 308, 311 (5th Cir.) (21 U.S.C. § 846 conspiracy and RICO conspiracy are separate offenses), *cert. denied*, 439 U.S. 931 (1978).

Drake also challenges the jury's verdict to forfeit certain of his assets pursuant to 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(a). The jury returned a special verdict forfeiting 15 of 18 items presented by the government. Drake asserts that such a split verdict is inconsistent with the determination of his guilt: either he engaged in racketeering activities and all of the items must be forfeited, or he was not and none of the items should be forfeited. This argument has no legal support. The district court correctly instructed the jury on forfeiture after the guilty verdict. *See United States v. Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). The Court in *United States v. Grammatikos*, 633 F.2d 1013, 1024 (2nd Cir. 1980), upheld the forfeiture of two of the nine items from the government

list. Furthermore, there is nothing inherent in the RICO statute that forbids the jury from finding those items that represent the defendant's interest in the enterprise. "What the jury did with the remaining counts is immaterial." *United States v. Michel*, 588 F.2d 986, 997 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979).

We have carefully reviewed the appellants' remaining arguments, which included claimed errors as to continuances, sealing of tapes, and jury instructions and find them without merit.

Conclusion

Although the district court's trial of appellants was not perfect, it was fair. In accordance with the above discussion, we AFFIRM the appellants' convictions except as to those of Oscar Silva, which we REVERSE and whose case we REMAND for further proceedings; to Vance Williams, whose conviction on count 3 we REVERSE and VACATE; to Tanny Miller, whose convictions on counts 8 and 9 we REVERSE and VACATE; and as to Drake Williams, whose convictions on counts 5 and 6 we REVERSE and VACATE.

Appendix B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 85-2588

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

DRAKE WILLIAMS, ET AL.,
Defendants-Appellants

**Appeals from the United States District Court
for the Southern District of Texas**

**U.S. COURT OF APPEALS
FILED
MAY 13 1987
GILBERT F. GANUCHEAU
CLERK**

**ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC**

(Opinion January 29, 1987, 5 Cir., 1987, 809 F.2d 1072)
(May 13, 1987)

Before GEE and HILL, Circuit Judges, and HUNTER,*
District Judge. GEE, Circuit Judge:

* District Judge of the Western District of Louisiana, sitting by designation.

A number of the defendants have sought rehearing, as has the United States; and we write briefly in response to such of these suggestions as merit discussion.

In our original opinion, we concluded, for reasons there stated, that the refusal of the trial court to vior dire the jury at the behest of defendant Silva regarding the effect of midtrial publicity required reversal of his convictions. The United States suggests that we erred in so concluding, because the court did not deny Silva's request for an immediate inquiry but merely postponed it until the trial's end some eighteen days later. At that time, it is said, no one reminded the court of the deferred issue and consequently no inquiry was made.¹ We are unwilling to hold that, in order to preserve the point, counsel was obliged to again move the court for relief at the end of the proceedings. Counsel had made his motion and secured his ruling: that the court would take the matter up after verdict. Certainly it would have been the better practice for counsel to have reminded the court, but there is no indication in this record that counsel intentionally "sand-bagged" the court or that he abandoned the point. For all the record indicates (unless counsel did in fact remind the court, in which case the problem vanishes), the court's decision to pass on the motion at the end of trial slipped counsel's mind as it did the court's. In these circumstances, we cannot conclude that the point is not preserved.

The United States also suggest that a remand for purposes of recalling the jurors and examining them to determine whether any were influenced by the publicity would be a more appropriate, and less drastic, remedy than a new trial. While the suggestion is not entirely without precedent,

1. There is some dispute whether the motion was renewed, but we assume for purposes of our inquiry that it was not.

we do not believe that an inquiry at this late date into the effect of publicity upon them months ago would be practical. A new trial of Silva must remedy the defect.

Appellant Salvador Meraz contends that the midtrial publicity was innately prejudicial to his case. We earlier concluded that the substance of the publicity could not be taken as probative of his guilt and therefore did not raise a serious question of possible prejudice. We address this point on rehearing because one of the damaging newspaper articles mentioned Meraz by name. The article appearing in the April 26, 1985, *Houston Post* contained the following passage:

Supporting testimony of previous witnesses, Reinhart said two members of the alleged gang — Williams and Salvadore [sic] Meraz — described to her how their alleged gang is structured.

She said Williams once drew a "tree," saying it showed that "Vance was at the bottom and the branches were the different people it (marajuana) went to." And she said Meraz, at a party in 1977, "pointed out everyone and told me what they did" in the alleged drug organization.

Houston Post, April 26, 1985, at 3A. Ms. Reinhart did not testify at trial that Meraz pointed out the members of the drug organization. These paragraphs present material that goes beyond the record and raises questions of possible prejudice to Meraz and therefore allows him to cross the initial threshold of the inquiry.

We now must determine the likelihood that these two paragraphs actually influenced the jury's deliberations. *United States v. Manzella*, 782 F.2d 533, 543 (5th Cir.), *cert. denied sub nom Jimenez v. United States*, _____ U.S. _____, 106 S.Ct. 1991, 90 L.Ed.2d at 672 (1986). Meraz was mentioned only near the end of a medium-length article. The article focused on the bail revocation of Vance Williams and Oscar Silva and only incidentally mentioned Meraz. In addition, none of the follow-up articles mentioned Meraz. The above isolated reference to Meraz pales in comparison to the publicity that directly affected Vance Williams and Oscar Silva. We hold that the small amount of prejudicial publicity did not deprive Meraz of his right to an impartial jury. We therefore affirm Meraz's convictions.

Appellant Jan Grossman asks us to reconsider our holding that the government met its burden of proving that it used evidence derived from legitimate independent sources to prove his guilt. Grossman had talked to the DEA under an informal grant of use immunity. In our original opinion, we addressed only the use of evidence before the Grand Jury. Grossman asserts that the government has the burden of proving that the evidence presented at the trial was not tainted. We agree. The district judge did not have Grossman's immunized statements when he conducted the original *Kastigar* hearing and therefore would have been unable to decide the issue fairly. *See Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). The fact that Grossman talked to the DEA before his indictment under a grant of use immunity shifts the burden to the government "to demonstrate by a preponderance of the evidence an independent source for all evidence introduced." *United States v. Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974). The *Kastigar* hearing held by the district court was insufficient and therefore we remand with orders for the district court to conduct a hearing in accordance with the dictates of *Kastigar* and of this opinion.

Finally, we note a renewed objection on rehearing by Appellant Sahs, who takes us to task for "upholding the district court's mere statutory definition on the enterprise element" in the face of *United States v. Turkette*, 452 U.S. 576 (1981). As the court here stated, and Sahs correctly notes:

In order to secure a conviction under RICO, the government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." . . . The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

Id. at 583.

We have, of course, no quarrel with the court's view set out above; and we readily concur in Sahs' suggestion that the instruction employed here is not a model of charity and that the better practice is to instruct the jury by reference to the specific elements of proof set out in *Turkette*. These observations, however, do not avail Sahs, for in this case other portions of the instructions on count one effectively insure that the conviction was based on findings that inherently establish the requisites of a RICO enterprise. The conspiracy instruction clearly indicates that each individual defendant must have wilfully joined with the group (as a group). The conspiracy instruction also reemphasized that the common purpose this group of defendants was charged with pursuing was "to finance and purchase marijuana and cocaine from each other and other persons, to provide storage and transportation and distribution of the substances, to collect and

distribute funds realized from the distribution, to legitimize income and to travel to accomplish these things." A conviction under the conspiracy instruction, therefore, insures that the jury found that a true RICO enterprise existed, because the instruction specifically tied the conspiracy charge to a description of a pattern of planned activities that inherently suggest the existence of an ongoing organization and a continuing unit of associates.

Except as indicated above, the Petitions for Rehearing are **DENIED**; and, no member of this panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are **DENIED**.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee
United States Circuit Judge

Appendix C

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Appellate Procedure***Rule 2 –*****Suspension of Rules**

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Rule 28 –**(i) Briefs in Cases Involving Multiple Appellants or Appellees.**

In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

Federal Rules of Criminal Procedure***Rule 11 – Pleas*****(a) Alternatives.**

(1) **In General.** A defendant may plead not guilty, guilty, or nolo contendere. If a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) **Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to

review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order him to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been

made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding on the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the

opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

1 However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Federal Rules of Criminal Procedure
Rule 14 - Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

18 U.S.C.S. § 1952 (Law. Coop. 1979)

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

- (1) distribute the proceeds of any unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or
- (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act [21 USCS § 802(b)]), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C.S. § 1961 (Law. Coop. 1979)

§ 1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.] –

(1) "racketeering activity means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), action 1084 (relating to the transmission

of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS § 1861] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 USCS § 501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States; the Deputy Attorney General of the United States, and Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS § § 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS § § 1961 et seq.] either the investigative provisions of this chapter [18 USCS § § 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C.S. § 1962

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities

of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

21 U.S.C.S. § 841(a)(1)

§ 841. Prohibited acts A

(a) **Unlawful acts.** Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Appendix D

JUDGMENT AND PROBATION/COMMITMENT ORDER

SOUTHERN DISTRICT OF TEXAS

Docket No. H-84-230-02

FILED

SEP 6 1985

DEFENDANT

VANCE WILLIAMS

In the presence of the attorney for the government the defendant appeared in person on this date → August 26 1985

COUNSEL

☐ **Without Counsel** However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ **With Counsel**

Clyde W. Woody
(Name of Counsel)

PLEA

☐ **GUILTY**, and the court being satisfied that there is a factual basis for the plea,

☐ **NOLO CONTENDERE,**

☒ **NOT GUILTY**

FINDING & JUDGMENT

There being a verdict of ☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of in violation of Title 18, United States Code, Section 1962(d) and 1962(a), as charged in Counts 1 and 3 of the Indictment, respectively.

Offense was committed between August, 1974 and October, 1984.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWENTY (20) YEARS and a fine of \$25,000 as to each of Counts 1 and 3. Further, the imprisonment portions of Counts 1 and 3 are to be served concurrently, with the fines to be consecutive.

The above sentence represents a total period of confinement of TWENTY (20) YEARS and a \$50,000 fine.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

APPROVED: s/s JD

SIGNED BY

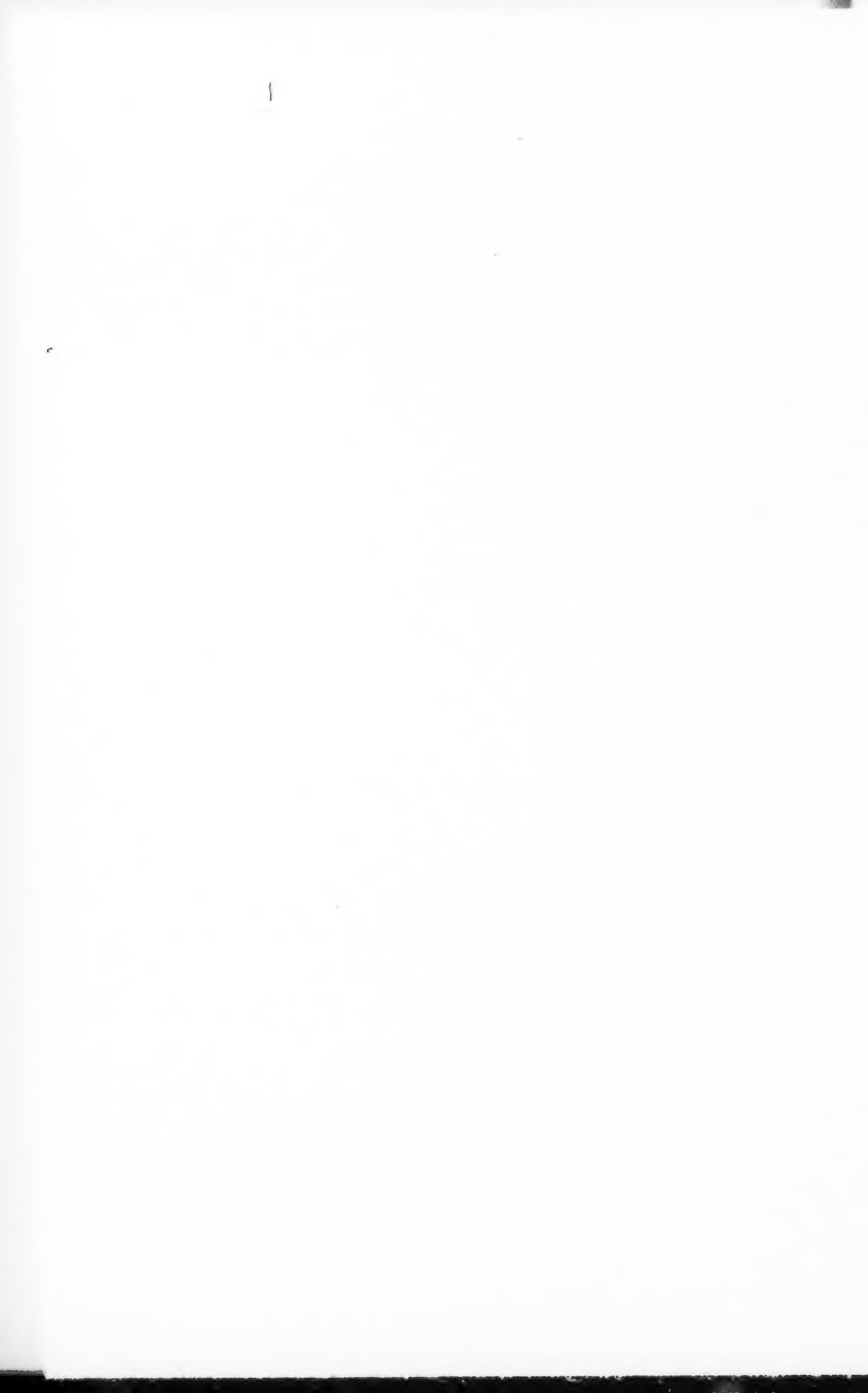
☒ U.S. District Judge
☐ U.S. Magistrate

s/s James Deanda
JAMES DEANDA Date: Sept. 6, 1985

It is ordered that the Clerk deliver a certified copy of this Judgment and commitment to the U.S. Marshal or other qualified officer

CERTIFIED AS A TRUE COPY ON
THIS DATE 9-6-85

By s/s P. Griffith
Deputy



4d

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

FILED

SEP 6 1985

JESSE E. CLARK, CLERK
BY DEPUTY: s/s P. Griffith

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2588

DRAKE WILLIAMS, et al

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas,
Houston Division

APPELLANT VANCE E. WILLIAMS'
RECORD EXCERPTS

CLYDE W. WOODY
1500 UNITEDBANK PLAZA
1415 LOUISIANA
HOUSTON, TEXAS 77002

ATTORNEY FOR APPELLANT,
VANCE E. WILLIAMS

RECORD EXCERPTS

**COURT'S RULINGS THAT ALL OBJECTIONS AND
MOTIONS OF ONE DEFENDANT ARE CONSIDERED
RAISED BY ALL OTHER DEFENDANTS**

1. Record Excerpt 1 - Transcript of March 25, 1985,
pp. 11-12
2. Record Excerpt 2 - Transcript of March 26, 1985,
pp. 39-40
3. Record Excerpt 3 - Transcript of April 4, 1985,
pp. 8-9
4. Record Excerpt 4 - Transcript of May 14, 1985,
p. 169
5. Record Excerpt 5 - Transcript of May 14, 1985,
p. 178

Record Excerpt 1
Transcript of March 25, 1985, pp. 11-12

Is there any thing else that we need to take up?

MR. DeGUERIN: On behalf of Oscar Silva, we are requesting additional strikes for all the defendants. We have discussed this among counsel for the defendants. There are ten defendants and eight sets of lawyers. We request three strikes per set of lawyers for a total of twenty-four strikes. I've calculated that on the number of jurors that we have and there are sufficient jurors.

THE COURT: I'll deny the motion. I'll give you ten strikes to be exercised jointly by the defendants on vior dire. There's no adversity between any of the defense.

MR. DeGUERIN: We don't know of any, but there may be some come up.

THE COURT: You won't know when you make the strikes.

MR. DeGUERIN: That leaves a total of one strike per defendant, Your Honor.

THE COURT: If you strike them jointly, each of you has ten strikes. Just exercise the strikes jointly.

MR. DeGUERIN: There are different theories of defense, conflicting to some extent. What might be an acceptable juror for one defendant may not be for the other. We respectfully request additional strikes.

THE COURT: I'll deny the motion.

Is there anything else?

MR. DeGUERIN: May we have an understanding, Your Honor, that motions, objections and soforth made by any one of the defense counsel are adopted by all unless a lawyer opts out of the motion.

THE COURT: Or unless you want to supplement the objection, you can do that. You don't have to all make the same objection. In other words, one objection made by one lawyer I will assume was made by all defendants. If you feel your co-counsel has not made an adequate objection or in your case may require additional edification, I'll let you do that. You don't have to preserve the record. The objection of any defense lawyer applies to any defendant.

MR. COLLINS: For the defendant Michael Sahs, we too filed a notice of appeal from the final order denying our motion to dismiss and we would ask the Court stay the proceedings.

THE COURT: Have you filed a motion to stay the proceedings?

MR. COLLINS: Yes.

THE COURT: Have you filed it?

MR. COLLINS: No, we filed a notice of appeal.

THE COURT: I will deny—what is it you want to tell me as far as your motion is concerned?

MR. COLLINS: We are only asking for a stay of proceeding.

THE COURT: On double jeopardy grounds?

Record Excerpt 2
Transcript of March 26, 1985, pp. 39-40

A We met, we seemed to get along quite well, shared our drug experiences and the drugs we were using at the time for each other.

Q Did Michael say what his drug experiences were?

A He talked about them to some extent at that time, nothing major though, just basically, you know, he used drugs and sold them —

MR. DeGUERIN: This is not a conversation in furtherance or during the alleged conspiracy. We object to it as far as Mr. Sahs is concerned and as for an instruction to the jury not to consider it as evidence.

THE COURT: Let me see how the evidence develops and I'll give you that instruction if it's appropriate. At this time I'll overrule it and I'll carry it along.

MR. DeGUERIN: I need not make it again?

THE COURT: No, no Defendant does. I understand what you're saying, this is just an explanation of how he met Mr. Sahs and their early relationship. I'll admit it for that purpose and that purpose alone.

MR. BASS: May the record reflect that all of the Defendants would join —

THE COURT: I thought that's what we said at the very beginning, counsel. Nobody has to make any objections except for one lawyer. It goes for everybody. Unless you need to supplement the objection, you certainly have a right to do that or if you don't agree with it, you have the right to call it to my attention.

Go ahead.

MR. MAGIDSON: Thank you, Your Honor.

Q Did your relationship with Michael Sahs continue?

A Yes.

Q What was the basis or what happened in regard to this continued relationship?

A During that period of time the people who I associated with and living around with were pretty lawless type of individuals and because of it certain law enforcement agencies become aware of our presence and we did have police raid the apartment buildings I was living at even though I personally wasn't at home at the time. They arrested a number of people and seized numerous amounts of drugs.

Q What type of drugs were seized?

A They seized LSD, marijuana, hashish.

Q Was this the same apartment building where Michael Sahs was living?

A Yes, it was.

Q He just moved previously to that—let me clarify

Record Excerpt 3
Transcript of April 4, 1985, pp. 8-9

THE COURT: In light of that I'll overrule the objection.

MR. DeGUERIN: Could we have a specific ruling on that motion for a mistrial?

THE COURT: I'm denying it.

MR. DeGUERIN: I will now also furnish the Court with a tender of proof in support of expanded cross examination of Mr. Cassias, the tender of proof being suggested questions and a copy of a transcription of Mr. Cassias' testimony in his own trial.

THE COURT: I think it's all cumulative and repetitious and I so ruled, counsel. I understand what you're saying, but I think you've impeached this man time and again on inconsistent statements and admitted perjury, admitted convictions, he's admitted payments. I think it's very well embedded in the jury's mind and we can go on forever on this. I don't think it will add anything to the case.

I'll deny any further cross examination on that, but you incorporate in the record, of course, you're entitled to your bill and I want it to be part of the record.

MR. MALLETT: I don't want to delay the trial but I think the record needs to reflect a specific request on behalf of my client we be considered in joining Mr. DeGuerin.

THE COURT: Gentlemen, I've said it and I've resaid it and I'll say it one more time, so we won't delay this case so much. If there is an objection, any motion that any defendant makes, it may be utilized by all the defendants

without joining in the motion. It's just in as much as in effect now as when I made the rule. Please, don't keep concerning yourself with that. You're covered in the record.

The only exception to that is if you do not want to join, so state or I will consider you all joined. Or, if you want to add anything to the motion or to the objection because there's something you may not think is adequate, I'll let you do that. Other than that, you are fully protected in the record and I will consider the objection by one lawyer the identical objection as to all counsel. The same applies to motions. It applies to everything, as far as the predicate on appeal is concerned.

MR. R. S. BENNETT: The defendant Beverly Lunday and Eddie Orellana have a request. It's my understanding I believe that the government is going to go into the wiretap, going to have it introduced and if it does happen we'd like special instructions given to the jury, the fact that they are not on the wiretap, not involved in the wiretap and that's not to be considered in any way against them. Also we request a separate motion in Liminee filed with the Court making sure the government in no way makes any reference to its agents or anyone who testifies that Eddie Orellana or Beverly Lunday are involved in that wiretap in any way.

Record Excerpt 4
Transcript of May 14, 1985, p. 169

capsule form. I'm going to overrule that one. I believe the jury understood the charge. I was trying to shorthand edition it. I think I explained it fully.

MR. R.C. BENNETT: Those are Defendant Williams' objections.

THE COURT: I'll have all of the defendants adopt any objections so you don't have to reurge any objections. All defendants may adopt any objections made by any other defendant, unless you disavow it or unless you want to add to it, but I don't want to have all of you voicing the same objections. So, I will consider an objection by one as an objection by all to the extent it's applicable here.

All right, Mr. DeGuerin.

MR. DeGUERIN: Yes, Your Honor. Specifically—first, generally I would like to object to the failure of the Court to give Oscar Silva's requested jury instructions one through thirty—thirty-eight and specifically, it is sufficient to call to the Court's attention my objection.

THE COURT: You don't have to read each one of them. I know what they said. I read them all before I gave my charge and we went over them informally. If I had given in substance all of them, or most of them and there's one or two in there I haven't, I think maybe the appellant rule requires you to be more specific in your thrust on

Record Excerpt 5
Transcript of May 14, 1985, p. 178

MR. MAGIDSON: As far as the statute of limitation, with regard to the statute of limitations it is covered by all of them.

THE COURT: I'd wished they'd picked out Mr. Silva instead of Mr. Williams but they're the ones that came to mind first. If I start giving him a special instruction, I'll have to give all the defendants. It will end up the same way. I can't give it to one defendant and not another because you raised the point. I think it would demean the other defendants of the issue unless I treated you all the same because I think the defense applies to all of you. So, I'm going to deny your request.

MR. DeGUERIN: Some people have raised it and some people haven't raised it.

THE COURT: I ruled anything that anybody raises unless disavowed by another—I can't imagine anybody repudiating the statute of limitations. I don't know anybody that doesn't agree to that. But, that was the rules we played by and that's the way we've gone by the whole case and we are still playing by those rules.

MR. DeGUERIN: Not to argue with the Court, Your Honor, but I think it should be applied to whoever it is applied. I think it, of course, should be applied to Oscar Silva specifically because he's raised it. It ought to be applied to anybody—that's the trouble with a mase

Appendix F

**IN THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

**APPELLATE NO. 85-2588
USDC# CR-H-84-230**

VANCE E. WILLIAMS,

Appellant

VS.

UNITED STATES OF AMERICA,

Appellee

**U S COURT OF APPEALS
F I L E D
MAY 29 1986
GILBERT F. GANUCHEAU
CLERK**

GRANTED BY CLERK FOR COURT

s/s illegible

5-29-86

Deputy Clerk

Date

MOTION TO ADOPT

**TO THE HONORABLE UNITED STATES CIRCUIT
JUDGES:**

**COMES NOW, Appellant, VANCE E. WILLIAMS, by and
through his undersigned attorney, and files this Motion to
Adopt and, in support thereof, would show the following:**

I.

Pursuant to **Rule 28(i) of the Federal Rules of Appellate Procedure**, Appellant, Vance E. Williams, moves to adopt the following issues raised in the briefs filed on behalf of other appellants in the above-styled cause:

Appellant Drake A. Williams

Issue Number One - Whether the trial court's comments about defense counsel called into question the credibility of the evidence or testimony denying defendant effective assistance of counsel.

Issue Number Two - Whether the trial court tipped the scales of justice and denied defendant a fair and impartial trial by excessive comments and questions.

Issue Number Three - Whether the trial court abused its discretion in denying defendant's motion for continuance.

Issue Number Four - Whether the trial court erred in denying Drake Williams a severance from Jan Grossman.

Issue Number Five - Whether the prosecution waived its right of confrontation and, thus, its right to raise a hearsay objection by preventing Jan Grossman from testifying.

Issue Number Six - Whether the trial court erred by excluding the testimony of Jan Grossman as hearsay.

Issue Number Seven - Whether Drake Williams was denied due process by the government's failure to request immunity for Jan Grossman or the court's failure to compel immunity.

Issue Number Eight - Whether the government failed to disclose exculpatory testimony of Jan Grossman to the grand jury.

Issue Number Nine - Whether the trial court erred in denying Drake Williams a severance from Vance Williams because of the substantial likelihood of confusion in identification.

Issue Number Eleven - Whether the trial court abused its discretion in denying Drake Williams a severance from Vance Williams after Vance Williams' incarceration during trial was widely publicized.

Issue Number Fourteen - Whether the prosecution acted in bad faith in dismissing the first indictment.

Issue Number Sixteen - Whether after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of forfeiture beyond a reasonable doubt.

Issue Number Twenty - Whether the trial court's instructions on the enterprise element of a RICO offense are inadequate.

Issue Number Twenty-One - Whether the court erred in denying defendant's request for

special issue submission regarding commission of overt acts.

Appellant Oscar D. Silva

Issue Number Two - Whether Silva was denied a fair trial by the derisive, sarcastic and biased comments of the district judge.

Issue Number Three - Whether Silva was denied confrontation when the district court restricted cross-examination of the primary government witness against him.

Issue Number Four - Whether the district court should have excluded prejudicial, remote, dissimilar "Other Crimes" evidence. F.R.EVID. 403,404(b)

Issue Number Five - Whether the district court should have at least asked the jury about prejudicial publicity during trial.*

Issue Number Eight - Whether the evidence sufficiently showed an affirmative link between any RICO activity and Silva's purchase of his home, so as to justify forfeiture.

Issue Number Nine - Whether the district court denied Silva due process when it refused to instruct the jury that they must unanimously agree on which two, if any, racketeering acts Silva committed, and refused to submit Silva's proposed special issues on this point.

* (emphasis added)

Appellant Michael Sahs

Issue Number Two - The trial court's denials of Mr. Sahs' motions to sever were erroneous.

Issue Number Three - The court below erred in instructing the jury on the enterprise element of a RICO offense.

Appellant Jan E. Grossman

Issue Number Two - The district court erred in failing to instruct the jury, over timely request of the defendants, that an "enterprise" within the meaning of Title 18, United States Code, Sections 1962(c) and (d), in a prosecution pursuant to the Racketeering Influenced and Corrupt Organization Act (RICO), must have (i) an ascertainable structure; (ii) operate as a continuing unit; and (iii) have a goal common to its members.

Issue Number Three - The district court committed reversible error and over-stepped the bounds of judicial propriety by repeatedly injecting itself into the course of the trial, chastising and disciplining defense counsel in the presence of the jury, belittling defensive efforts aimed at attacking the credibility of government's witnesses and by failing to conduct the trial in an impartial manner.

Issue Number Five - The district court reversibly erred in its instructions to the jury when the court literally referred to an alleged

incident that had been testified about in the course of the trial *as if the incident had actually occurred.*

Due to the page limitations on the appellate brief and the fact that Appellant's Motion for Leave to Exceed the Page Limitation was denied, the presentations of issues on behalf of Appellant, Vance E. Williams, was greatly restricted.

WHEREFORE, PREMISES CONSIDERED, Appellant, Vance E. Williams, moves to adopt the above-described issues raised in the briefs filed on behalf of the above-named appellants in the above-styled cause.

RESPECTFULLY SUBMITTED,

s/s Clyde W. Woody
 CLYDE W. WOODY
 TEXAS STATE BAR NO. 21982000

ATTORNEY FOR APPELLANT,
 VANCE E. WILLIAMS

1500 UNITEDBANK PLAZA
 1415 LOUISIANA
 HOUSTON, TEXAS 77002
 (713) 222-8282

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion to Adopt was forwarded by certified mail, return receipt requested, to Mervyn Hamburg, Attorney, Appellate Section, Criminal Division, U.S. Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044; and to Mr. James Gough, Assistant United States Attorney, U.S. Courthouse, 515 Rusk Avenue, Houston, Texas 77002; and forwarded by regular mail to David Berg at 3702 Travis, Houston, Texas 77002; Michael Tigar at University of Texas Law School, 727 E. 26th Street, Austin, Texas 78705; Dick DeGuerin at 1018 Preston, 7th Floor, Houston, Texas 77002; R. S. Bennett at 1001 Texas, Suite 1010, Houston, Texas 77002; Jim Skelton at 1610 Richmond, Houston, Texas 77006; George M. Secrest, Jr. at 3401 Louisiana, Suite 270, Houston, Texas 77002; Charles L. Roberts at 505 Caples Building, P.O. Box D, El Paso, Texas 79951-0004; and to Ray Bass, 5244 Memorial, Houston, Texas 77002 on this the 27 day of May, 1986.

s/s Clyde W. Woody
CLYDE W. WOODY

Appendix G

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 85-2588

DRAKE WILLIAMS, et al

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court
for the Southern District of Texas,
Houston Division**

**APPELLANT VANCE E. WILLIAMS'
PETITION FOR PANEL REHEARING**

**TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT:**

COMES NOW, Appellant, **VANCE E. WILLIAMS**, by and through his undersigned attorney of record, and presents unto this Honorable Court this his petition for a panel rehearing pursuant to **Rule 40 of the Federal Rules of Appellate Procedure** and, in support thereof, respectfully shows the following:

I.

On January 29, 1987, a judgment was entered by this Honorable Court in the above-entitled cause. The Court reversed and vacated Appellant Vance E. Williams' conviction of Court 3 of the Indictment and affirmed his conviction of Count 1 of the Indictment in this case.

II.

The Court, in its opinion in this case, reversed and remanded the convictions of co-appellant Oscar Silva on the grounds that the trial court committed reversible error by failing to inquire of the possible contamination of the jury resulting from extensive midtrial publicity. The prejudicial publicity concerned front-page newspaper coverage, photographs, as well as television and radio broadcasts of the bail revocation of Appellants Vance E. Williams and Oscar Silva. The Court noted that at trial "Silva squarely moved for a voir dire of the jury members". On page 44 of the Court's opinion regarding the midtrial publicity in this case, the Court held that "The conviction of Appellant Oscar Silva must be reversed and his case remanded for further proceedings on these grounds". The Court further stated that "Appellant Vance Williams did not contend on appeal for a reversal for prejudicial publicity. Nor did he adopt the arguments of his co-appellants pursuant to Federal Rules of Appellate Procedure Rule 28(i). We therefore cannot reverse as to him on these grounds".

III.

On May 27, 1986, Appellant Vance E. Williams mailed an original and four copies of his Motion to Adopt to the Court and said motion was received by the Clerk of the Fifth Circuit Court of Appeals on May 29, 1986. A copy of

Vance E. Williams' Motion to Adopt is attached hereto as Exhibit "A" and a Copy of the transmittal letter and return receipt are attached hereto as Exhibit "B". Pursuant to said Motion to Adopt, Vance E. Williams moved to adopt Issue Number Five of co-appellant Oscar Silva entitled "Whether the District Court Should Have At Least Asked The Jury About Prejudicial Publicity During Trial". Vance E. Williams specifically and timely moved to adopt Silva's prejudicial publicity issue pursuant to **Rule 28(i) of the Federal Rules of Appellate Procedure**. Appellant was unable to address the issue of prejudicial publicity in his brief due to the page limitations and his unsuccessful attempt to obtain permission to exceed the page limitations. Further, Vance E. Williams adopted all motions and objections made at trial on behalf of his co-defendants including Silva's trial motion for a voir dire of the jury concerning the prejudicial publicity at issue. (R.E. 1-5)

IV.

Appellant Vance E. Williams moves the Court for a panel rehearing on the issue of prejudicial publicity as raised by co-appellant Oscar Silva and adopted by Vance E. Williams. Vance E. Williams further moves the Court for a reversal of his conviction on Count 1 of the Indictment in this cause on the grounds of prejudicial publicity.

WHEREFORE, PREMISES CONSIDERED, upon the foregoing grounds, Appellant Vance E. Williams, respectfully urges the Court to grant this Petition for Panel Rehearing and to reverse Appellant's conviction of Count 1 of the Indictment in this cause.

RESPECTFULLY SUBMITTED,

s/s Clyde W. Woody

4g

CLYDE W. WOODY
TEXAS STATE BAR NO. 21982000

ATTORNEY FOR APPELLANT,
VANCE W. WILLIAMS

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition for Panel Rehearing was forwarded by certified mail, return receipt requested, to Mervyn Hamburg, Attorney, Appellate Section, Criminal Division, U.S. Department of Justice, P. O. Box 899, Ben Franklin Station, Washington, D.C. 20044; Mr. James Gough, Assistant United States Attorney, U.S. Courthouse, 515 Rusk Avenue, Houston, Texas 77002; David Berg at 3702 Travis, Houston, Texas 77002; Michael Tigar at University of Texas Law School, 727 E. 26th Street, Austin, Texas 78705; Dick DeGuerin at 1018 Preston, 7th Floor, Houston, Texas 77002; Jim Skelton at 1610 Richmond, Houston, Texas 77006; Robert S. Bennett, 1001 Texas Avenue, Suite 1010, Houston, Texas 77002; George M. Secrest, Jr. at 3401 Louisiana, Suite 270, Houston, Texas 77002; Charles L. Roberts at 505 Caples Building, P. O. Box D, El Paso, Texas 79951-0004; and to Ray Bass, P. O. Box 237, Austin, Texas 78767 on this 5 day of February, 1987.

s/s Clyde W. Woody
CLYDE W. WOODY